Albert LARAMIE, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP94-017, 2 CTCR 10, 22 ILR 6072, 6 NALD 7001
3 CCAR 1

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-17014]

Arguments heard November 18, 1994. Decided May 1, 1995.
Before Presiding Justice Nelson, Justice Bonga and Justice Miles

NELSON, P.J.

This matter came before the Appellate Panel for hearing on the appeal of Albert Laramie of his denial to trial by a jury on the grounds that he failed to confirm his demand for a jury trial in a timely manner.

FACTS

Albert Laramie was arraigned on January 10, 1994, on various misdemeanor charges. He entered pleas of Not Guilty and demanded a jury trial. A trial date was set and he was given a Notice of Court Appearances and Advisement of Rights which included the following paragraph:

> "I understand that if I have requested a JURY trial, I must confirm my request on the date indicated above or my trial will be changed to a JUDGE trial. The request must be made in writing and received by the Court by the date indicated."

The date indicated was March 14, 1994. The Court also advised Mr. Laramie orally of the "10 day rule" which states:

> "The Court must be notified by the defendant ten (10) days prior to a scheduled jury trial that a jury trial is Still requested, or the right to a jury trial is waived." CTC 4.1.05.

On March 14 Mr. Laramie's attorney, Jeffrey Rasmussen, filed written confirmation of the request for a jury trial. It was later learned, however, he would be unavailable for trial and the date was continued to April 21, 1994.

Eight days before the re-scheduled trial date he filed another confirmation of the request for a jury trial. The appellee, Colville Confederated Tribes, subsequently moved for an order finding Mr. Laramie had waived his right to trial by jury by not filing the confirmation of jury trial in a timely manner.

Judge Stewart heard the motion on April 19 and determined the Mr. Laramie had waived his right to a jury trial. He was subsequently tried before and convicted by Judge Wynne.

He appeals the denial of his right to trial by jury.

RIGHT TO TRIAL BY JURY

In considering this matter the panel looks in order of priority to the following: the Constitution and Bylaws of the Tribes, applicable laws of the Tribes, tribal case law, state common law, federal statutes, federal common law and international law. CTC 4.1.11.

The Constitution and By-laws of the Confederated Tribes of the Colville Reservation do not address the rights of individual Tribal members, including the right to trial by jury. These rights have been established, however, in several titles of the Colville Tribal Codes.

All accused persons are guaranteed the civil rights secured under the Tribal Constitution and federal laws specifically applicable to Indian tribal courts. CTC 2.6.09.

25 U.S.C. 1302 *et seq*. is known as the Indian Civil Rights Act. Its purpose is to "secur(e) for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments." *Santa Clara Pueblo v. Martinez*, 486 U.S. 89, 98 S.Ct. 1670, 56 L.Ed2d 106, (1978).

25 U.S.C. 1302(8) states in pertinent part: "No Indian tribe in exercising powers of self-government shall deny to any person accused of an offense by imprisonment the right, upon request, to a trial by jury ...".

CTC 56.02(j) states "The Confederated Tribes of the Colville Reservation in exercising powers of self government shall not ... deny to any person accused of an offense punishable by imprisonment the right, upon request, to a Tribal jury of not less than six persons."

The provision authorizing the "ten day rule", CTC 4.1.05, is found in the Tribal Law and Order Code in the Chapter entitled "Rules of Court - General Provisions". It is clear that the chapter encompasses both civil and criminal law. Our analysis concerns only its application to the criminal law and procedure.

CTC 4.1.05 is the later enacted provision and

> "It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes." *Sutherland Statutory Construction*, Section 51.02, 5th Edition.

Prior enactments relating to the same subject should be compared to the new provision. If reasonable construction permits, both should be construed to give effect to every provision of them. *Sutherland* at 51.02.

In our effort to "give effect to every provision of them" we have looked to other jurisdictions for guidance. Particularly helpful are comments contained in *Confederated Salish and Kootenai Tribes v. Peone*, 16 ILR 6136, 6137 (1989), *Seattle v. Williams*, 101 Wn.2d 445, 680 P.2d 1051 (1984) and *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968).

In *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968), the United States Supreme Court stated in pertinent part:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about a way in which law should be enforced and administered. A right jury trial is granted to criminal defendants in order prevent oppression by the Government. Those who wrote our Constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protections against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge .... (T)he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

At 20 L.Ed.2d 500.

The parties agree that the defendant is entitled to a jury trial upon request and that a request was made. The remaining question is

Whether a Criminal Jury Trial Can Be Presumed Waived by Failure to Confirm a Demand for Jury Trial

The sole assignment of error in this appeal is whether the Trial Court wrongfully denied Albert Laramie his right to a jury trial in a criminal case.

The parties have given much consideration to issues variously related to the assignment of error. These include, but are not limited to: whether an attorney can waive a defendant's right to trial by jury; whether requiring a defendant to confirm his demand for trial by jury is an impermissible burden on the defendant; and whether the prosecution can elect to try a defendant by a judge trial.

The only issue the Appellate Panel need consider is whether the fundamental right to trial by jury, once demanded, can be presumed waived by failure of the defendant to confirm his demand at least ten days before trial. We conclude that it cannot.

Whether a waiver of jury trial can be presumed was considered in *Seattle v. Williams*, 101 Wn.2d 445, 680 P.2d 1051 (1984). That court held:

> "In company with the United States Supreme Court, we are now committed to the principle that waiver of an important constitutional right, such as the right to trial by jury, cannot be assumed from a silent record even though the defendant was represented by counsel. *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2nd 274, 89 S. Ct. 1709 (1969); *State v. Wicke*, 91Wn.2d 638, 591P.2d 452 (1980); *State v. Rinier*, 93 Wn.2d 309, 609 P.2d 1358 (1980). The burden is on the prosecution to establish that the waiver was knowing and voluntary. *Boykin v. Alabama, supra* .....
> "Additional guidance is found in our decision in *State v. Wicke*, 91Wn.2d 638, 645, 645 P.2d 452 (1979):
> "In examining a claimed waiver by a criminal defendant of a right constitutionally guaranteed to protect a fair trial, it would seem that every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary."

The Tribe argues that the difficulties of bringing in jurors over long distances and the efficient administration of justice mandate the need for defendants to confirm the jury demand at least ten days before the trial date scheduled.

The Tribe further argues that should a defendant not confirm his demand for jury he can move to continue the trial and then renew his demand for a jury trial. This is referred to as the "safe harbor" doctrine and, therefore, the right to a jury trial is guaranteed. The parties agree that such motions for continuance are routinely granted.

Mr. Laramie contends that he should not have to confirm his jury demand because trial by jury is a fundamental right and, once demanded, should not be subject to additional conditions. The Tribe agrees the right to a jury trial in criminal cases is a fundamental right. It responds, however, that the interests of efficiently administering justice does not impose a substantial burden on defendants.

While we are sympathetic to the concerns of the Tribe, the fundamental right of a criminal defendant to a trial by jury cannot be diluted because of administrative difficulties.

The issue whether the right to trial by jury in criminal cases can be presumed waived was considered previously in *Colville Confederated Tribes v. Randy L. Thomas*, No. 89-12425 (1990) and *William Coleman v. Colville Confederated Tribes*, No AP92-15405, [1 CTCR 74, 2 CCAR 1], (1993). After due consideration, we now over-rule our decisions in those cases to the extent that they are inconsistent with our holding today. We hold for the

reasons stated that CTC 4.1.05 is not applicable to criminal trials.

The conviction of the defendant, Albert Laramie, is reversed and the matter is remanded to the trial court for a jury trial.

Noreen LEZARD, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP94-019, 2 CTCR 11, 22 ILR 6135, 6 NALD 7009

3 CCAR 4

[Dianna Caley, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Stephen Suagee, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-17039]

Argued June 23, 1995. Decided August 7, 1995.
Before Presiding Justice Bonga, Justice Miles and Justice Nelson

BONGA, P.J.

The Appellate Panel of [Presiding Justice] David Bonga, [Justice] Wanda Miles and [Justice] Dennis Nelson convened for oral arguments in this matter on June 23, 1995 at the Colville Tribal Courthouse. Attorneys present were Dianna Caley for the appellant and Stephen H. Suagee for the appellee.

After reviewing the file and hearing oral arguments the Appellate Panel holds that Judge Collins did act within the scope of his authority in determining that the defendant had committed contempt of a court.

However, the Panel holds that Judge Collins did abuse his judicial discretion as to the sentence. The Panel therefore holds that the sentence below regarding jail time is reversed and that the fine and costs assessed below are affirmed.

FACTS

This matter arose when defendant Lezard who was scheduled for a jury trial on June 23, 1994 at 9 a.m. failed to appear when Judge Wynne called for the case to convene. A bench warrant was issued by Judge Wynne and the trial date was struck at 9:15 a.m.

Defendant appeared in Court at 9:30 a.m. on June 23, 1994. A hearing was held before Judge Collins who found defendant in contempt of Court for not timely appearing at 9:00 a.m. for her jury trial.

Judge Collins sentenced the defendant to pay the Court Clerk ½ the fees allocated to the jury venire assembled and (1) hour in attorney time based upon ½ hour each for the prosecutor and defense counsel at the rate of $100.00 per hour.

The defendant was further sentenced to a jail term of 16 days, with 12 days conditionally suspended. The defendant was to immediately serve two (2) days in jail and then serve two (2) additional days in jail beginning August 23, 1994 to insure that defendant appeared for her jury trial that was set for August 25, 1994.

DISCUSSION

The Appellate Court finds that the Colville Tribal Court derives its contempt powers through the Court's inherent authority and by statutory authority found in Colville Tribal Code (CTC) sections 1.12.02 and 1.12.03.

The Court disagrees with Appellant's position that under CTC 1.12.02 and CTC 1.12.03 summary proceedings are only authorized for criminal contempt. The Appellate Court holds that the Trial Court has the inherent power to use summary proceedings to deal with contempt committed in the face of the Court. The Panel does not agree that if the Court is relying on its inherent powers rather than the statutory provided procedures that it must make a finding on the record that the statutory provided procedures are insufficient. Therefore the Panel agrees with the position that the Trial judge has broad authority, within reason, to initiate any proceedings necessary to assure compliance with Court orders.

The Panel also adopts the position that the broader construction of the notion "contempt in the face of the Court" is appropriate under Tribal law to enable the Court to assert its authority consistent with CTC 1.5.05 in order to utilize such means as are necessary to carry its jurisdiction into effect. That is, the Court finds that a failure to timely appear such as that which occurred in the instant case is "contempt in the face of the Court" under Tribal law and justifies the utilization of summary proceedings.

However, the fact that Judge Collins presided over the summary proceedings does not negate the Court's decisions regarding the defendant's contemptible actions, as the Appellate Panel finds that the Court's discretionary powers provide a great latitude to a presiding judge in determining appropriate punishment for contempt. However where jail time is a part of the punishment which denies a defendant their Constitutionally guaranteed right of freedom, which cannot be ended or cured by the contemner, the Appellate Panel holds that the defendant must be provided Constitutionally guaranteed due process rights of appropriate notice, the right to a hearing to present evidence and call witnesses.

In the case at bar defendant Lezard was sentenced to a jail term of 16 days, with 12 days suspended conditionally. The defendant was ordered to immediately serve 2 days in jail and serve two (2) additional days in jail at a later date. Thus there were no remedial actions which the defendant could have taken which would have precluded the jail sentence. The defendant was not provided with an opportunity to cure her situation which would have prevented her from spending a minimum of four (4) days in jail. The defendant was therefore denied her Due Process rights and the Panel, through its appellate power, dismisses the jail time imposed by the Trial Court.

In Re the Welfare of J.A.M., K.A.M, P.M., S.Z.
M. Z., Appellant.
Case No. AP94-030, AP95-010, AP95-011 3 CTCR 14
3 CCAR 6

[Dianna Caley, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant/Mother.
Steven Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minor.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Children & Family Services.
Juvenile Court Case Numbers J94-13041, J94-13042, J94-13043, J94-13044]

Argued June 23, 1995. Decided August 7, 1995.
Before Presiding Justice Bonga, Justice Miles and Justice McGeoghegan

BONGA, P.J.

The Appellate Panel of Presiding Justice David Bonga, Justice Wanda Miles and Justice Earl McGeoghegan convened for the oral arguments in this matter on June 23, 1995 at the Colville Tribal Courthouse. Attorneys present were Dianna Caley, counsel for the mother; Lin Sonnenberg, counsel for appellee, Tribal Children & Family Services (hereinafter CFS); and Steven D. Aycock, spokesperson for the children.

After reviewing the file and hearing oral arguments the Appellate Panel holds that the Colville Tribe had proper jurisdiction to decide this matter.

The Panel further holds that the Order from November 1, 1994 review hearing is vacated and that this matter is remanded so that a new hearing to modify the dispositional order may be held that will allow proper notice to the parties.

FACTS

The Colville Tribes Children's Court first exercised jurisdiction in this matter in June 1994 by issuing a protective custody warrant for the subject minors.

In July of 1994 a Petition for Minor-In-Need-Of-Care (hereinafter MINOC) was filed by the Tribes. At an adjudicatory hearing on July 27, 1994 the parties stipulated to the facts in the Petition.

On August 12, 1994, an Order from the adjudicatory hearing was entered which concluded that the Colville Tribal Court had exclusive, original jurisdiction under CTC 12.5.01(a).

In late September 1994, CFS moved the Children's Court for a hearing on placement of the minors, because the mother had left the children with a babysitter and had not returned at the appointed time.

On October 6, 1994 a hearing was held to determine if the Dispositional Order should be modified to change placement from the mother to placement at the discretion of the Tribes. The parties agreed to allow the mother to keep physical custody subject to the emergency removal of the Tribes. The parties agreed that if such removal occurred then a hearing would be held within 48 hours of the removal.

November 3, 1994 a motion was filed to hold an emergency hearing pursuant to the October 13, 1994 order.

On November 4, 1994 a hearing was held on the motion for an emergency hearing. The mother, M. Z., was not at the hearing and had no notice of it. The minors made a motion to continue since the mother had no notice and was not at the hearing. The motion was joined by the spokesperson for the mother. The Court denied the motion and changed physical custody of the children.

DISCUSSION

Jurisdiction

It is the holding of this Panel that generally speaking the question of jurisdiction of a court may be raised at any time. However, the rule is not as broad as it may seem.

At the June 1994 custody hearing, Appellant moved to dismiss because the Court lacked jurisdiction. This was denied by the Court. The judge ruled that the Tribes had at least concurrent jurisdiction in this case.

The adjudicatory order was issued on August 12, 1994. That order states that the Tribes have exclusive, original jurisdiction over the case. Pursuant to statue, this order was a final order. CTC 12.7.21. In order to perfect an appeal from that order a Notice of Appeal must be filed within ten days (CTC 1.9.30), which would have been by August 22, 1994. No Notice of Appeal was filed until November 9, 1994. Therefore the appeal on the jurisdiction issue was not perfected.

This Court has ruled in a similar case before. In *[Elaine] Smith v. CCT*, AP90CV89-952, [1 CTCR 54, 1 CCAR 48], (Colville Court of Appeals, 1991) the trial court had addressed the issue of jurisdiction and found that it did have jurisdiction. It then ruled against Appellant on the merits. Appellant perfected an appeal. Appellee, by motion rather than a cross-appeal, then moved this Court to dismiss based upon lack of jurisdiction.

The Court ruled that since the issue of jurisdiction had been raised below and adjudicated by the Trial Court, the only way to raise the issue on appeal was through a cross-appeal. In other words, if the issue is raised and litigated, the party harmed by the ruling must perfect an appeal on that issue. As indicated above, a perfected appeal on the jurisdiction issue in this case would have required a Notice of Appeal to be filed by August 22, 1994.

In *Smith, supra.*, at pages 1-2, this Court held: "[W]e find that even though the argument as to jurisdiction can normally be raised at anytime, the fact that it was litigated below is dispositive and that disposition is reviewable only by a properly filed appeal." As stated above Appellant did not properly file an appeal on the jurisdiction issue in this case and as such the issue was waived.

NOTICE

The Tribal Civil Rights Ordinance requires the Tribes to meet due process requirements. CTC 56.02(h). Although federal and state law on due process are not binding on this Court, the Tribal Court has held over the years that due process is required and that notice and hearing are fundamental to due process.

The Colville Code recognizes the importance of family within the Tribes and states that it is the preference of the Tribes that children be given care and guidance in their own homes and that family ties be preserved and strengthened whenever possible. Accordingly the Code set forth detailed procedures to protect the rights of parents and to avoid needlessly shattering families where less drastic intervention would suffice. Under CTC 12.7.24 the Court is required to give the parents and their counsel notice of a hearing to modify a dispositional order.

The Court finds that substantive rights of M. Z. were adjudicated at the November 4, 1994 hearing which required her to receive proper notice of the November 4, 1993 hearing which modified the existing dispositional order as physical custody of her children was removed from her and given to other family members.

Based upon this lack of notice the November 4, 1994 order is vacated and this matter is Remanded to the Children's Court for setting of hearing on the issue of placement, with proper notice thereof.

Sylvester SAM, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP95-005, AP95-006, 2 CTCR 15, 2 CTCR 26, 2 CTCR 27

3 CCAR 8

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15379, 92-15280]

Decided August 25, 1995

Before Presiding Justice Nelson, Justice Chenois and Justice Stewart (AP95-005, 2 CTCR 26)

Before Presiding Justice Nelson, Justice McGeoghegan and Justice Miles (AP95-006, 2 CTCR 27)

NELSON, P.J.

BACKGROUND

In March 1993, Sylvester Sam was convicted of Driving While License Suspended and was sentenced to one year in jail. His appeal of the sentence was denied and the matter was remanded to the Trial Court on March 8, 1994.

In April 1994, he filed a second appeal, this time challenging the law upon which he was convicted. He was again unsuccessful and the matter was remanded to the Trial Court on March 16, 1995.

On April 20, 1995, Mr. Sam appeared before the Trial Court for a status conference to determine whether to lift the Order Staying Judgment and Sentence. He requested and was denied an additional thirty days in order to prepare a Motion to Modify Judgment and Sentence.

Mr. Sam then requested thirty days to get his affairs in order before reporting for his jail service. The Court granted him twenty four hours.

Immediately following the hearing, he filed this appeal claiming the Court had wrongfully delayed his report date for jail service for thirty days.

On April 28, 1995, the Trial Court heard Mr. Sam's Motion to Stay (apparently oral as there is no written record of it). The Motion was denied on the grounds the appeal had not been perfected.

DISCUSSION

Mr. Sam was ordered to report for jail service by 5:00 p.m., April 21, 1995. He has not reported and the thirty days he requested to get his affairs in order has long since elapsed.

The issue is moot whether the Trial Court has authority to delay the reporting date for jail service by thirty days. "It is a general rule that, where only moot questions or abstract propositions are involved...the appeal should...be dismissed." *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

ORDER

Therefore it is Ordered that the appeal is Dismissed and this matter remanded to the Trial Court for an order committing the appellant to jail forthwith.

Albert LARAMIE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP94-017, 2 CTCR 48, 22 ILR 6250

3 CCAR 9

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-17014]

Decided September 11, 1995.

Before Presiding Justice Nelson, Justice Bonga and Justice Miles

NELSON, P.J.

The Appellate Panel has reviewed the Trial Court's Order Staying Proceeding; Order Certifying Issues to Appellate Court; and Order Striking Jury Trial filed July 7, 1995, and again orders the matter remanded for trial by jury.

There is no established procedure authorizing the Trial Court to certify issues to the Appellate Court and this Panel is without authority to promulgate one. The Trial Court is instructed to proceed in the matter established by previous practice.

It is the judgment of the Panel that the Memorandum Opinion heretofore entered is clear on its face regarding which laws are applicable in Tribal Court and no explanation is required.

The Appellant's Motion to Dismiss Appeal or in the Alternative to Dismiss Case is denied.

In Re the Welfare of A.S.
L.S., Mother/Appellant.
Case No.AP95-019, 3 CTCR 15
3 CCAR 10

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant/Mother.
Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minor.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Tribes.
Juvenile Court Case Number J95-14107]

Decided on September 28, 1995.
Before Presiding Justice Nelson, Justice Bonga and Justice Fry

FRY, J.

This matter came regularly before the Colville Tribal Court of Appeals by conference call on September 20, 1995. The following persons were present: Presiding Justice Dennis Nelson, Justice David Bonga, Justice Elizabeth Fry, and Court Clerk Diana Aiken.

The Court, having reviewed the records and files herein, and being fully advised in the premises, found that the Order of Disposition was invalid in that it had not been signed by the presiding judge, and further that this was significant in that the presiding judge had heard three witnesses during that hearing prior to ruling, and the Court further finds that Judge Mary T. Wynne needs to file an Order of Disposition with the Court, now, therefore,

It is Ordered that:

1. The order dated August 31, 1995 and signed by Judge Brian Collins is invalid.

2. Judge Mary T. Wynne needs to sign an order from the disposition hearing of August 8, 1995.

3. The appeal on file in this case, numbered AP95-019, is hereby Remanded to the Trial Court for entry of the proper Order of Disposition.

It is so Ordered.

Gerald SEYMOUR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP94-004, 2 CTCR 12, 23 ILR 6008

3 CCAR 11

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 93-16449 to 93-16452]

Arguments heard March 24, 1995. Decided November 17, 1995.
Before Presiding Justice Collins, Justice Bonga and Justice Miles

COLLINS, P.J.

These consolidated appeals were brought before the Court for review by Gerald Seymour who seeks to overturn his criminal convictions in the Colville Tribal Court for four misdemeanor offenses. Seymour contends that the Trial Court erred in denying his pre-trial motion for a competency hearing. Seymour also asserts that he was incompetent to be tried or sentenced and that his Judgment and Sentence should be overturned.

The Appellate Panel consisting of [Justices] David Bonga, Wanda Miles and [Presiding Justice] Brian Collins having fully reviewed the record below, the appellant's brief and heard oral argument, now affirms the appellant's convictions.[1]

I. FACTUAL AND PROCEDURAL HISTORY

During the night of September 24, 1993, Seymour was seen along a roadside within the Colville Reservation by two patrolling Tribal police officers. As the officers were about to pass by, Seymour jumped in front of their patrol car. When Officers Graham and Dunne contacted Seymour they observed that he appeared highly intoxicated and agitated. Seymour kicked the side of the patrol car, threatened the officers and tried to instigate a fight. After arresting Seymour for disorderly conduct, officers Dunne and Graham put him in the patrol car, where he began spitting and kicking the interior of the car. Seymour was described as having violent mood swings during which he tried to attack the officers followed by periods of calm.

Officers Dunne and Graham called their supervisor, Sergeant Evans, who assisted in the handling and transport of Seymour following his arrest. Seymour was transported to the police station and, while Sergeant Evans was removing Seymour from the patrol car, Seymour kicked him in the chest.

On September 28, 1993, Seymour was charged with Battery, Intimidation of a Public Officer, Resisting Arrest or Process, and Disorderly Conduct.[2] The Court appointed the Office of the Public Defender to represent him. At Pretrial Hearing on October 11, 1993, the defense made no pretrial motions related to Seymour's competence to stand trial. Seymour was scheduled for jury trial on October 28th and was held in jail pending trial.

On October 27, 1993, the day before trial, defense counsel Jeffrey Rasmussen filed an Agreed Motion To Continue with appended affidavit of counsel. Defense Counsel asked to continue the trial because "defendant is

[1] The Tribes' counsel did not file a Responding Brief in this appeal, saying she forgot.

[2] Battery, CTC 5.1.04; Intimidation of a Public Officer, CTC 5.4.11; Resisting Arrest or Process, CTC 5.4.17; Disorderly Conduct, CTC 5.5.04.

unable to participate or assist in his own defense." In his affidavit, defendant's attorney stated that he had visited Seymour in jail on two occasions. The first visit was on or about October 5th and again on October 26, 1993. Counsel stated that during the first visit he was able do discuss the facts of the case, the defenses and possible punishments with Seymour. However, during the second visit, which lasted approximately one-half hour, Counsel stated that Seymour "did not appropriately respond to any of my questions and so we were unable to discuss any issues." Counsel goes on to state that if the matter went to trial on October 28, 1993, he did not believe Seymour would be able to assist with his own defense, and if called to testify, he would be unable to respond to questions. Counsel also stated that Seymour was not taking his medication.

Defense counsel also stated in his affidavit that both the Public Defender's office and the Prosecutor's office were working to obtain the "appropriate mental health evaluations and statutory requirements to determine if defendant should be committed to Eastern State Hospital." Affidavit of Jeffrey Rasmussen.

On October 28, 1993, the day of trial, the appellant's motion to continue trial was heard, and Defense Counsel orally moved for a competency hearing under RCW 10.77.[3] Seymour appeared for hearing and was examined by counsel for the defense and prosecution. In addition, the trial judge questioned Seymour at length.

During questioning, Seymour knew he was in court for a plea, responded to events which occurred during the incident which led to his arrest, was able to recite the charges against him. The record shows that Seymour's responses to questions were at times muffled, that he seemed to be distracted, was nonresponsive to some questions and gave inappropriate answers to others. The record also shows that Seymour followed the proceedings. At the conclusion of the hearing the Court denied Defendant's Motion To Continue the Trial and defense counsel's Motion For Competency Hearing, finding him competent to stand trial.

Subsequently, Seymour was tried and convicted at jury trial. He now appeals asserting that the Court erred in not ordering a psychiatric examination, convening a competency hearing and finding him competent to stand trial. Seymour asks the Court to overturn his conviction alleging that his right to due process of law was violated.

II. DISCUSSION

A. Failure To File Brief

Appellee's counsel failed to file a Response Brief on behalf of the Confederated Tribes. *supra*, n.1. The appellee urges the Court to reverse the Tribal Court on those grounds. We decline to do so. While we have dismissed appeals because the appellant failed to file a brief, we will not automatically reverse a decision of the Tribal Court when the appellee does not file its brief. The burden rests with the appellant to make out his case on appeal.

If the Court adopted a rule whereby reversal would automatically occur when appellee's counsel either forgot or refused to file a brief, the obvious result would be that counsel, and not the Court, could determine the law.[4] The Court simply will not engage in that practice.

B. Due Process

It has long been recognized that a criminal defendant who is incompetent should not be required to stand

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[3] A review of the court file does not reveal that a Motion For Competency Hearing was filed.

[4] Depending on the facts of the particular case, an attorney's failure to file a brief, as ordered by the Court, calls into question the quality of the attorney's representation of the client, adherence to required practice standards of attorneys appearing before the Court and other standards adopted by the Business Council concerning Tribal Court practice which are sworn to by the attorney. CTC 1.6.03(4).

trial. *Dusky v. United States*, 362 U.S. 402 (1960). This principle is well established as a matter of federal constitutional law and deeply rooted in common law predating the United States Constitution. *Drope v. Missour*i, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), citing 4W. Blackstone, Commentaries 24. Under federal constitutional principles, requiring an incompetent person to stand trial violates the Due Process Clause of the Fourteenth Amendment.

Similarly, a body of state common law has developed over the years applying federal due process principles. Until legislative bodies codified standards and procedures to guide the courts in making determinations regarding competency, the courts were required to rely exclusively on their inherent judicial powers to make such determinations. *State v. Wicklund*, 96 Wn.2d 798, 801, 638 P.2d 1241, (1982). (Citations omitted)

This is the first opportunity we have had to review a determination of the Tribal Court in which a criminal defendant has asserted incompetency to stand trial, and the Court, after examining the defendant, denied a motion for a competency hearing and ordered the defendant to stand trial.

The Business Council has adopted, as part of the Colville Tribal civil Rights Act (CTCRA), CTC 56.02(h), which recognizes that criminal defendants may not be deprived of liberty or property without due process of law. In addition, the United States Congress in enacting the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec. 1302 (8), requires that persons coming before tribal courts be afforded due process of law. The due process guarantee to a fair trial under the CTCRA and the ICRA include the right of a defendant not to be convicted or sentenced while incompetent. That being said, we do not conclude that the Tribal Court must adopt the same criteria as applied in other jurisdictions as to making a determination when a person is incompetent to stand trial.

We note that many criminal defendants coming before the Tribal Court are not familiar with court procedures and may well find the process intimidating. Such defendants may react or respond differently than they would be expected to based upon the standards applied in other courts. Therefore, we give deference to the first hand observations of a sitting judge in the Tribal Court and view precedent from other jurisdictions with caution as to its applicability in Tribal Court. Nor do we conclude that the Tribal Court is required to follow the same procedures in deciding whether to order a competency hearing or in making a competency determination as under state or federal statutory law. Thus, we do not hold that due process guarantees under the Tribal Civil Rights Act and Indian Civil Rights Act are necessarily identical to those under the federal constitution.[5]

C. Standard of Review

The Colville Business Council has enacted no statutes to guide the Tribal Court as to the circumstances under which it is required to order a competency hearing for a defendant alleging incompetency to stand trial. Nor are there Tribal statutes defining incompetency or establishing a procedure for the Court to follow in making competency determinations. Until uniform standards and procedures are adopted by the Business Council, the Tribal Court must, like other courts have done prior to enactment of competency statutes in their jurisdictions, rely on its inherent authority for those purposes.[6]

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[5] We have previously held and again emphasize that statutory due process under the Indian Civil Rights Act and Colville Tribal Civil Rights Act is not coextensive with constitutional due process. The Congress intended that protections included within the Indian Civil Rights Act which are similar to those in the Bill Of Rights are to be applied in accordance with Tribal standards. In looking to federal or state common law due process principles, we do so with caution. Tribal values must always be the background to which those standards are applied.

[6] The Court must necessarily exercise its inherent authority by making inquiry as to a defendant's mental condition when it is suspected that the person may not be competent to stand trial. Secondly, the Court must exercise its inherent authority to ensure that an incompetent defendant's due process guarantees will not be violated by requiring that person to stand trial while incompetency persists.

The Business Council has provided the Court with broad discretion, in the absence of statutory direction, to "adopt a process or mode of proceeding" to determine whether further inquiry should be made as to a criminal defendant's competency and, if so, how the proceeding will take place. CTC 1.5.05. Thus, we will not disturb the process or mode of proceeding adopted by the Tribal Court or reverse the Tribal Court's refusal to make further inquiry as to a defendant's competency to stand trial unless clear abuse of discretion is shown. The Tribal Court judge is in a far better position to question the person alleging incompetence, observe his demeanor and evaluate the factors bearing on the question of a defendant's ability to participate in his own defense. Thus, the Panel will not disturb a decision of the Tribal Court in that regard unless manifest abuse of discretion is clearly shown.

D. Applicable Law

The parties have not provided the Court with Tribal statutory or case law which govern the outcome of the question before the Court. Therefore, the Court looks to the choice of law provisions set out in the Colville Tribal Law and Order Code to determine what law to apply. CTC 4.1.11.[7] Although both the appellant and the Tribes urge the Court to adopt RCW Chapter 10.77, which contains the procedural and substantive statutory law of the State of Washington, we decline to do so.

If the Colville Business Council intended the Court to apply State statutory law to address issues involving a defendant's competency to stand trial, it would have provided for doing so by statute or incorporated by reference RCW Chapter 10.77. For the Court to adopt state statutory law, as both the appellant and Tribal prosecutor urge, the Court would have to ignore the choice of law priorities set out in CTC 4.1.11, which does not include State statutes. Instead, we look to state common law to guide the Tribal Court with regard to competency procedures, together with federal common law for reference on how procedural and substantive standards applied by the Tribal Court affect due process guarantees under the Indian Civil Rights Act and Tribal Civil Rights Act.

E. Applicable Competency Standard

The test for determining competency of a criminal defendant to stand trial, as articulated by the Washington Supreme Court, is whether "he is capable of properly understanding the nature of the proceedings against him and if he is capable of rationally assisting his legal counsel in the defense of his cause." *State v. Gwaltney*, 77 Wn.2d 906, 907, 468 P.2d 433 (1970). (Citations omitted)

F. Procedure to Assess Competency To Stand Trial

The conviction of an accused person while legally incompetent violates due process. *Drope v. Missouri, supra; Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 76 L.Ed.835 (1956). Under federal due process standards, procedures employed by the Court to assess competency must be adequate to safeguard the defendant's rights. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815, 818 (1966).

It appears to the Panel that the Tribal Court placed the burden on the appellant to show that a competency hearing should be convened to establish whether he was competent to stand trial. This is in accord with Washington common law predating RCW 10.77.

> A person is presumed to be sane in ordinary affairs. After indictment the presumption of sanity continues until it is call in question from a reputable

[7] CTC 4.1.11 provides:

> In all cases the Court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.

> source and a sufficient specific declaration to the contrary. (Citation omitted)

State v. Henke, 196 Wash. 185, 194, 82 P.2d 567 (1938)

The United States Supreme Court has upheld a California statute on due process grounds which create a presumption that criminal defendants are mentally competent unless it is proved by a preponderance of the evidence that the defendant is incompetent. *Medina v. California*, 505 U.S. , 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). In that case the Court observed:

> In the field of criminal law, we have defined the category of infractions that violate fundamental fairness very narrowly based upon the recognition that, beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. (Citations omitted) (Internal quotations omitted)

120 L.Ed.2d at 362.

In addressing the appellant's contention that the Tribal Court was required to order a competency hearing under RCW 10.77, we reject the contention for the reason state statutory law is not applicable. However, we review the Court's refusal to make further inquiry as to the appellant's competency for abuse of discretion. An early Washington case concerning the Court's duty with regard to ascertaining a criminal defendant's competency to stand trial is instructive. The Washington State Supreme Court stated:

> [W]e are of the opinion that it is a matter within the discretion of the trial court as to whether or not it will enter upon an examination of the question of sanity of the accused with a view of determining the right of the state to put him upon trial and render judgment against him. We know of no statute of this state which makes it mandatory upon the trial court to enter upon such an inquiry or to appoint a commission looking to the determination of such a question. In states having statutes authorizing appointment of such a commission .... the rule seems to be that it is with the discretion of the trial court as to whether or not it will so proceed. (Citation omitted)

State v. Peterson, 90 Wash. 479, 482, 156 P. 542 (1916). Thus, the Washington courts adopted the "rule of discretion" in the absence of a specific statute directing the courts to order a competency evaluation for an accused alleging incompetency to stand trial. Accord, *Henke, supra* at 192.

From the above discussion, we conclude that when a question is raised by either party as to a criminal defendant's competency to stand trial, a two step process occurs. The threshold question is whether the party raising the issue presents evidence raising a significant question as to a defendant's competency to stand trial from which the Court should make further inquiry. Such inquiry ordinarily begins by ordering that the accused be examined by a psychiatrist or psychologist with demonstrated skills to render an opinion as to whether the defendant "is capable of properly understanding the nature of the proceedings against him and if he is capable of rationally assisting his legal counsel in the defense of his cause."

The second stage of this analysis is for the Court to make a competency determination, based upon evidence, whether the defendant is able to stand trial. The Tribal Court has wide discretion in selecting the process or mode of proceeding to make the determination. CTC 1.5.05. If the defendant is found to be incompetent, the condition is presumed to continue until the contrary is shown. *Henke, supra* at 194 (Citations omitted).

G. Did the Court Abuse its Discretion by Refusinq To Convene a Competency Hearing?

The question presented is whether there was a substantial doubt shown at hearing as to Seymour's competency to stand trial such that the Tribal Court should have made further inquiry. For the reasons stated above, we review the Tribal Court's denial of the motion to continue the trial and order a competency hearing for abuse of

discretion. See also, *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144 (1986) .

In addressing the above question, we look to how courts from other jurisdictions have reviewed similar issues. A motion to determine competency does not have to be granted just because it has been filed. *State v. Lord*, 117 Wn.2d 829, 901, citing *United States v. McEachern*, 465 F.2d 833, 837 (5th Cir.), *cert. denied*, 409 U.S. 1043 (1072). There must be some factual basis in support of the motion. The Court will then inquire as to the facts asserted, and in doing so give consideration to the following:

1.The defendant's apparent understanding of the charge and the consequences of conviction;
2. The defendant's apparent understanding of the facts giving rise to the charge;
3. The defendant's ability to relate the facts to his attorney in order to help prepare the defense.

Seattle v. Gordon, 39 Wn. App. 437, 441 (1985).

The record shows that the Tribal Court did inquire as to the above points and, together with testimony elicited through examination by counsel, we find the Court did not err in concluding that Seymour understood the charges against him and the consequences of conviction. Further, the record shows that Seymour was able to recollect and, although with some lack of clarity, relate an understanding of the facts which gave rise to his arrest. The record also shows that Seymour was unresponsive to some questions asked and gave inappropriate responses to others during examination by counsel and the Court. The Tribal Court judge was in a position to observe Seymour's demeanor, listen to his responses on examination, assess whether his not taking medication affected his mental state to the extent that a substantial question was raised as to his competence to stand trial. The Tribal Court judge was also in a position to determine whether Seymour might be malingering and trying to avoid trial.

Although the record below raises some question as to Seymour's competence, we conclude that the appellant has not shown that the Tribal Court clearly abused its discretion in concluding that the appellant understood the charges against him, the consequences if convicted or the facts giving rise to his arrest.

As to Seymour's ability to assist his attorney in preparation of a defense, the Tribal Court could have given more weight to the opinion of defense counsel as to Seymour's ability to assist. However, the record shows that the trial judge questioned Seymour on issues relevant to his ability to assist in his own defense at trial. The Tribal prosecutor, also presented her opinion as to Seymour's mental capacity and ability to assist at trial. However, the Tribe's counsel was not in the same position as Seymour's attorney to assess his ability to assist.

The appellant argues that under state law, Washington courts have indicated that the Court should give considerable weight to defense counsel's opinion regarding his client's competency. *State v. Crenshaw*, 98 Wn.2d 789, 659 P.2d 488 (1983). We also note that while the Court is not required to accept the attorney's representations as to the defendant's competency, the attorney's opinion is a factor which should be considered. *Drope v. Missour*i, 420 U.S. 162, 177 n.13, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

In addition, a criminal defendant's ability to assist defense counsel does not mean that he be able to suggest a particular trial strategy or choose among alternative defenses. *State v. Harris*, 114 Wn.2d 419, 428, 789 P.2d 60 (1991). See also, *State v. Hahn*, 106 Wn.2d 885, 726 P.2d 25 (1986); *State v. Ortiz, supra* at 483. The ability to assist even at trial is a minimal requirement. A criminal defendant is not automatically incompetent to stand trial because he suffers from the disease of schizophrenia. *Harris* at 429.

We observe that before the October 28, 1995 hearing, counsel for the defense and prosecution apparently concluded that there was a substantial question as to Seymour's competence to stand trial, and they set about arranging for a mental health examination. Affidavit of Jeffrey Rasmussen, *supra*. The record does not show that counsel did so with involvement of the Court. Thus, it appears to the Panel that counsel accepted as a foregone conclusion that Seymour's mental disease might well have rendered him incompetent to stand trial and strenuously advocated that position to the Tribal Court. Under the circumstances, the Panel finds that defense counsel's opinion

was given sufficient weight by the Tribal Court as to Seymour's ability to assist in his defense.

III. CONCLUSION

From the foregoing, we conclude that the Tribal Court did not abuse its discretion in denying the appellant's motions to continue trial and order a mental health examination, or by concluding that Seymour was competent to stand trial. Accordingly, it is Ordered that the appellant's convictions in the above matters are Affirmed.

Matthew BOYD Jr., Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP95-001, 2 CTCR 16, 2 CTCR 28, 23 ILR 6245

3 CCAR 18

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 93-16767, 93-16768]

Argued July 21, 1995. Decided January 19, 1996.
Before Presiding Justice Fry, Justice Bonga and Justice Miles

FRY, P.J.

This matter came regularly before this court for Oral Arguments on July 21, 1995. The following persons were present: Lin Sonnenberg, Prosecutor for Appellee, and Jeff Rasmussen, Public Defender.

The Court of Appeals, having reviewed the records and files herein, having heard the arguments of the parties, and being fully advised in the premises, bases its decision upon the following:

I. REVIEW OF CASE

The defendant plead guilty to the charges of Battery and Assault on March 10, 1994, and at the Sentencing Judge Brian Collins granted the plaintiff's motion to dismiss two charges of Intimidation.

The defendant was sentenced by Judge Collins on May 2, 1994 to the following:

1. Payment of a fine of $2,500.00 with $1,500.00 suspended conditionally.
2. Jail time of 180 days with 160 days suspended conditionally.

Conditions of suspension were that the defendant file an alcohol, anger, and sexual perpetrator evaluation from Tribal Community Counseling Services (TCCS) by August 2, 1994. The defendant was to follow their recommendations for one year, and was additionally ordered to file progress reports from TCCS.

The defendant was ordered to "fully comply with all portions of this order."

On July 15, 1994, the plaintiff moved to clarify the Judgment and Sentence, noting that TCCS had filed a memorandum with the Court that it did not have the certified personnel to complete the sexual perpetrator evaluation. The plaintiff asked the court to interpret its Judgment and Sentence to primarily mean that the defendant was required to complete a sexual perpetrator evaluation, and further requested that a new evaluator be assigned.

On August 2, 1994, a hearing was held on the motion and the plaintiff failed to appear. The Court denied the plaintiff's motion to clarify for want of prosecution.

On October 25, 1994, the plaintiff moved to show cause against the defendant for failure to file required evaluations and reports for alcohol, anger, and sexual perpetrator potential.

On December 14, 1994, the Court held a show cause hearing concerning the allegations. The Court found that the defendant had completed all the evaluations except the sexual perpetrator evaluation, and that it wasn't the defendant's fault that TCCS had failed to file the other evaluations. The Court found that the main purpose of the sexual perpetrator evaluation was rehabilitative, and additionally, that the Court would entertain a motion to apply up to the entire remaining balance of the defendant's fine ($500.00) to pay for a sexual perpetrator evaluation from a private mental health provider (which the defendant estimated to be approximately $300.00). The plaintiff moved to

so modify the Judgment and Sentence to reflect the change and the defendant stipulated to the agreement. The Court granted the motion. Later that day the defendant refused to sign the proposed order modifying the Judgment and Sentence.

On December 15, 1994 the Court signed the Order from Show Cause Hearing; Modification of Judgment and Sentence, giving defendant thirty days to file copies of all his evaluations with the Court, including a sexual perpetrator evaluation from a private mental health provider, and the remaining provisions of the Judgment and Sentence were to remain in effect.

On December 22, 1994, the defendant moved to reconsider the Trial Court's denial of finding that the defendant had violated the condition of his sentence that he obtain a sexual perpetrator evaluation. By affidavit the defendant argued that the price of a private provider's evaluation was higher than had been discussed in court.

On January 20, 1995, the Court denied the defendant's motion to reconsider on the grounds that the defendant had stipulated to the evaluation and recommendation of TCCS, and that the defendant had waived his right to re-address the matter by stipulating to the evaluation and order which applied the balance of the fine to the private provider evaluation.

On February 2, 1995, the defendant filed an appeal.

On March 20,1995, the Trial Court judge stayed the Judgment and Sentence.

II. ISSUE

Did the court err in modifying the defendant's sentence to require that he obtain a sexual perpetrator evaluation from a program other than TCCS?

III. DISCUSSION

Since the defendant stipulated to the modification of the Judgment and Sentence, it seems appropriate for this Court to question his argument that he should not have been found in violation of the Judgment and Sentence. The Show Cause hearing's purpose, besides determining violations of the Judgment and Sentence, was clearly held to determine ways for the defendant to **implement** the Judgment and Sentence. It seems that a generous solution was agreed upon by the parties, and that later the defendant changed his mind.

According to the Black's Law Dictionary, Fifth Edition, 1979, at page 1269, the definition of "stipulation" includes,

> "A material condition, requirement, or article of an agreement."
> "The name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing), regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction. Voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues, *Arrington v. State*, Fla., 233 S.2d 634, 636. An agreement, admission or confession made in a judicial proceeding by the parties thereto or their attorneys. *Bourne v. Atchison, T. & S. F. Ry. Co.*, 209 Kan. 511, 497 P.2d 110, 114.

It is clear from the definition of stipulation that it is an agreement between the parties, it is voluntary, and that its purpose is to dispose of or agree to some relevant matter in the proceeding. In this case, there was a dispute as to the meaning of the original Judgment and Sentence regarding the sexual perpetrator evaluation. However, the defendant agreed to forgo that argument when he stipulated in open court, on record, to evaluation by the private provider. Of course the advantage to him was that he would be allowed to offset the cost of the evaluation against the balance due on his fine. This was a substantial advantage to him.

The defendant then later changed his mind about the stipulation. However, there has been insufficient

evidence by the defendant to show that the stipulation was either unfairly obtained or unduly prejudicial in order to warrant reversal. Therefore, this Court affirms the decision of the Trial Court.

IV. DECISION

Based on the foregoing discussion, this Court affirms the decision of the Trial Court to modify the Judgment and Sentence herein, and remands this matter to the Trial Court to carry out its decision in that order dated December 15, 1995, and titled Order From Show Cause; Modification of Judgment and Sentence.

John C. CLARK, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP94-027, 2 CTCR 17, 2 CTCR 30, 25 ILR 6066

3 CCAR 21

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-16642]

Arguments heard October 27, 1995. Decided January 26, 1996.
Before Presiding Justice Bonga, Justice Miles and Justice McGeoghegan

BONGA, P.J.

An initial hearing on the Appeal occurred by conference call on January 3, 1995 with the Appellate Panel of [Justice] Wanda Miles, [Justice] Earl McGeoghegan and [Presiding Justice] David Bonga. The Appellate Court considered the Notice of Appeal and requested the parties submit a briefing schedule by January 13, 1995. Further, the Appellate Panel requested copies of the trial tapes for the September 20,1994 hearing and the Appellate Clerk issued notice to the Trial Court to provide copies to the Panel.

FACTS

On October 20, 1993, Appellant John C. Clark appeared pro se before the Trial Court, the Hon. Judge Howard Stewart presiding, for arraignment on the charge of Driving While Under Influence of Intoxicating Liquor. Appellant pled guilty, and the Court accepted his plea. Without objection from the parties, the Court then proceeded to sentencing Appellant on the charge.

The Court's oral order regarding sentencing was a fine of $1000, with $550 suspended, 30 days in jail, with 30 suspended, with conditions that defendant commit no alcohol-related offenses on the reservation, file an alcohol evaluation from TCCS and follow their evaluation for one full year.

On September 20, 1994 Appellant appeared before the Trial Court, the Hon. Judge Brian Collins presiding, in answer to a Summons to show cause why the Court should not re-impose the suspended portions of the Judgment and Sentence for Appellant's failure to file quarterly progress reports. After being sworn, Appellant testified that he had been going by what the Court had ordered and stated that Judge Stewart had not mentioned quarterly reports. Defendant also testified that he had not received the Court's written Judgment and Sentence.

The Court and Prosecution questioned Defendant regarding receipt of the Court order, and the prosecution expanded his cross examination to cover new issues relating to compliance with the TCCS evaluation. Defendant was asked whether he had abstained and remained sober. The defendant initially invoked his right not to incriminate himself but, when later asked a similar question, Defendant testified that he had told his alcohol counselor that he had "slipped a few times" during his recovery.

The Court found that Defendant had violated the terms of his suspended sentence in two manners: first, that he had not filed quarterly progress reports, and second, that Mr. Clark had consumed alcohol during the year's probation. The Court reinstated the full suspended sentence.

DISCUSSION

Issue

Does the Trial Court have Jurisdiction to hold a Show Cause hearing prior to the date of the Pre-Dismissal hearing?

It is the decision of the Appellate Panel that the Trial Court has statutory, as well as inherent and implied authority, to enforce its orders during the term of its jurisdiction over a criminal defendant. CTC 1.5.05. The Panel does not agree with Appellant's position that the Court lacked jurisdiction to hold a Show Cause hearing prior to the pre-dismissal hearing, as it would prevent the Court from enforcing any of its orders in a criminal case until the Pre-Dismissal hearing, that would effectively hamstring the Trial Court's ability to maintain order, function as a court or administer justice.

The Colville Tribal Code mandates that the Court must schedule a Show Cause Hearing within 10 days of the Pre-Dismissal Hearing if it appears a defendant is out of compliance with the Court's order, CTC 2.4.05, but does not, by its own terms, prohibit the Court from holding Show Cause Hearings on other occasions when it appears that a defendant is out of compliance with the Court's orders. *Id.* It is the opinion of the Appellate Court that the Code is clear on its face, mandating a Show Cause Hearing under one specific set of circumstances and not denying the Court the use of Show Cause Hearings on other occasions to enforce the Court's orders. See CTC 1.5.05.

The Appellate Panel therefore holds that the Trial Court has authority to hold Show Cause hearings for the purpose of enforcing its orders during the pendency of its jurisdiction over a criminal defendant.

Issue

Does the Trial Court's oral order take precedence over the written order?

In the captioned matter, there is a conflict between the oral order of the Court and the written order filed in the Court file. The legal rule related to such conflicts is that the oral order takes precedence over the Court's written order.

The Appellate Panel finds merit in the holding of *U.S. v. Villano*, 816 F.2d 1448 (10th Cir. 1987) which stated, "It is a firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when the two conflict. This rule is recognized in virtually every circuit."

While the Colville Tribal Court is not bound by federal court holdings, *Stead v. CCT*, [AP91-14281, 2 CTCR 02, 2 CCAR 27, 21 ILR 6005] (Colville Appellate Court, 1993) the Appellate Panel believes the *Villano* is based on important considerations of fairness to defendant and of the right to be present during sentencing. *Villano, supra.* at 1452. The Appellate Panel believes that these considerations of fairness apply to the Colville Tribal Court, and the Tribes guarantee of due process and the right to notice and a hearing. CTC 56.02.

The Panel also agrees with the appellant's position that the Colville Tribal Court is not a traditional justice system for any of the tribes of the Reservation, and that the Tribal Court therefore has a greater need to insure that tribal defendants understand the system and the conditions of the Anglo-modeled sentence. It is the opinion of this Panel that explanation and understanding of these concepts is best achieved through oral, face-to-face communications, as demonstrated by Judge Stewart in this matter.

However, the record reveals that Judge Stewart did not specifically order the defendant to submit quarterly progress reports. Therefore, it is fundamentally unfair to punish the defendant, who in good faith, relied on the words of the Trial Court judge, when his sentence was imposed. Allowing a judge to add written conditions at a later date, may at best be confusing to the defendant and may not adequately explain to the defendant the terms of his sentence.

Issue

Whether the Trial Court erred in finding that Appellant violated the recommendations in the alcohol evaluation by TCCS.

The Colville Tribal Court follows the rule that a criminal defendant is entitled to notice regarding the issues to be raised at a Show Cause hearing. In this case it was undisputed that the notice for the Show Cause hearing listed only failure to file progress reports as an issue. The Trial Court at the Show Cause hearing ruled that the defendant had, in addition to failing to file quarterly reports, failed to follow the recommendations of TCCS.

The Appellate Panel finds that Trial Court ruling in error.

For all the above reasons the Order from the Show Cause hearing in this matter is reversed and the matter is remanded to the Trial Court for appropriate action.

Richard KUHNS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP95-007, 2 CTCR 18, 2 CTCR 29, 24 ILR 6017

3 CCAR 23

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Russell Hansen, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-17447]

Argued October 27, 1995. Decided January 26, 1996.
Before Justice Fry, Justice Chenois and Presiding Justice LaFountaine

FRY, J.

This matter came regularly before this court for oral arguments and to hear the motion to settle on October 27, 1995. The following persons were present: Russell Hansen, Prosecutor, and Jeff Rasmussen, Public Defender.

The Court, having reviewed the records and files herein, having hearing oral arguments of the parties, and having specifically reviewed the tape of the Sentencing hearing, finds that the defendant's Notice of Appeal does not address the language in the Judgment and Sentence or the language on the tape of the Sentencing hearing, both of which mandate a hearing on the payment of the fine. The Court further finds that the tape also includes language considering the possibility of community service in lieu of fine, all of which the defendant failed to address, and about which the defendant misled the Appellate Court. Therefore, this Court finds that the Trial Court should be affirmed, and further that the matter should be remanded to the Trial Court to hold a hearing regarding payment of the fine.

It is Ordered that:

1. The decision of the Trial Court in this matter is affirmed.

2. This matter is remanded to the Trial Court to follow the Judgment and Sentence and hold a hearing regarding the payment of the fine by the defendant.

It is so Ordered.

Terrence LARAMIE, Appellant.

vs

COLVILLE CONFEDERATED TRIBES,

Case No. AP95-014, 2 CTCR 31

3 CCAR 24(1)

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 95-18158 to 95-18162]

Decided January 29, 1996.
Before Chief Justice Dupris, Justice Fry and Justice LaFountaine

DUPRIS, C.J.

This matter came before the Colville Tribal Appellate Court for hearing on motions and preliminary matters on this date, and the Appellate Panel, after reviewing the record and files, and hearing arguments, finds cause to enter the following orders, now, therefore

It is Ordered, Adjudged and Decreed that:

1. The appellee's Motion to Extend the Time to File its brief is granted in that the Appellate Panel does consider the arguments made therein on this date.

2. The appellant's Motion to Recuse Justice Frank LaFountaine is denied as (1) untimely; and (2) the case before this Appellate Court has not involved Justice LaFountaine, so there is no conflict of interest.

3. The parties' joint Motion to Dismiss is granted, but not for the grounds requested in the proposed order.

4. The appellant's Motion to Remand for Dismissal is denied as not properly pleaded to the Court.

In Re the Welfare of A.S.

L.S., Mother/Appellant.

Case No.AP95-019, 3 CTCR 16

3 CCAR 24(2)

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant/Mother.
Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minor.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Tribes.
Juvenile Court Case Number J95-14107]

Decided on February 8, 1996.
Before Presiding Justice Nelson, Justice Bonga and Justice Fry

On July 28,1995, A.S. was adjudicated a Minor-In-Need-Of-Care by Judge Mary T. Wynne. The Order of Disposition was entered on August 31, 1995.

L.S., mother of A.S., appeals the Order of Disposition on the grounds that she has been ordered to attend a "parenting class which is of unknown content or relevance" and to "read a book which is of unknown content or relevance." Other grounds for appeal are: denial of due process; lack of opportunity to introduce evidence; lack of opportunity to controvert contents and conclusions of the pre-disposition report; lack of opportunity to examine

witnesses; and lack of opportunity to be heard on her own behalf.

The Findings of Fact entered by Judge Wynne are not challenged by the appellant. The pertinent findings are:

> "4. The minor is diagnosed with type 1 diabetes mellitus with juvenile onset, which is treatable through regular injections of insulin daily, regular periodic testing daily for blood sugar level and regular ingestion of nutritious food. Failure to properly utilize insulin, monitor blood sugar levels and regularly ingest food can result in a significant rise or drop in blood sugar, leading to organ damage, coma and/or death.
>
> 5. The minor has also been diagnosed with depression and oppositional defiance disorder, has expressed suicidal ideation and has been treated at Pinecrest Hospital, Coeur d'Alene, Idaho; Sacred Heart Hospital, Spokane, Washington; and Tamarack Center, Spokane, Washington. The minor has refused to participate in outpatient mental health therapy since she was released from the Tamarack Center in March 1995.
>
> 6. The minor has not progressed during the last school term and was removed from the mainstream because of behavioral problems.
>
> 7. The minor has run away from the family home as well as other placements, including residential centers on the Colville Reservation and the home of her maternal aunt, L.S.
>
> 8. The minor has repeatedly been away from the family home after the hour of 11:00 p.m., without the permission of her mother and not in the company of any adult approved by her mother.
>
> 9. The minor's mother has been unable to control the minor's behavior, in that the minor's oppositional behavior has precluded academic achievement, the minor has regularly run away from adult supervision, the minor has jeopardized her health and actually become ill by failing to properly take her insulin injections, monitor her blood sugar level, and/or regularly ingest appropriate food and the minor has not participated in outpatient counseling.
>
> 10. The minor has been truant from school."

From the Findings of Fact, the Court concluded, *inter alia*, that "The mother, L.S., has been unable to provide the supervision and care necessary for the minor's health and well-being, in that she has been unable to control the minor's self-destructive behavior and has been unable (to) provide regular medical attention for the minor's juvenile diabetes." This conclusion is unchallenged by the appellant.

On August 8, 1995, a dispositional hearing was held wherein the Court heard the testimony and comments of those present, among whom were L.S. and her attorney.

The Order of Disposition directed the appellant, L.S., *inter alia*, to "read and report on the book, *Back in Control*" and to "attend 'Parenting with Love and Logic", a class provided through the Tribal Vocational Rehabilitation Program."

The Appellate Panel holds, after reviewing all assignments of error and the record herein, that the appeal of the Order of Disposition is frivolous[8] in the sense that, when reviewed in context, "there are no debatable issues

[8] There is no Tribal law regarding the nature of frivolous appeals. Therefore, the Panel in accordance with CTC 4.1.11 has looked to Washington State common law.

upon which reasonable minds might differ and [that the appeal]... is so totally devoid of merit that there was no possibility of reversal." *Streater v. White*, 26 Wash.App. 430, 435, 613 P.2d 187 (1980)[9]

The trial judge ordered the appellant to read *Back in Control* (which from its title implies regaining control in the parent-child relationship - certainly helpful here as the court has concluded the parent lacks supervisory skills) and attend parenting classes. These are not unusual or irrelevant orders in cases involving minors-in-need-of-care.

Therefore it is Ordered that the appeal of L.S. of the Order of Disposition entered August 31, 1994, is Dismissed.[10]

Harold PALMER Jr., Appellant,

vs.

Stan MILLARD, Chris EVANS, Lloyd FERRIER and
COLVILLE CONFEDERATED TRIBES, Appellees.

Case Number AP94-005, 2 CTCR 13, 23 ILR 6098

3 CCAR 26

[Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Andrea Geiger, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellees.
Trial Court Case Number CV91-11034]

Decided March 22, 1996.
Before Presiding Justice Collins, Justice Bonga and Justice Miles

COLLINS, P.J.

The appellant, Harold Palmer Jr. filed a Motion to Supplement the Record on May 26, 1995. On June 7, 1995, the appellees filed their Opposition to Motion to Supplement the Record. The Panel concludes that its review in the instant matter should be confined to the file and record from the Tribal Court. Palmer cites the Panel to no authority in support of his Motion. Nor is the Panel aware of authority under the Tribal Law which would authorize the Court to supplement the record below with materials generated outside the Tribal Court.

Therefore, It is Ordered that the appellant's Motion to Supplement the Record is Denied.

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[9] In the event reasonable minds might differ on the issues, the Panel also finds that any error of law which could possibly have been committed is harmless. Harmless error is error which is trivial, formal, or academic. *State v. Thacker*, 94 Wash.2d 276, 616 P.2d 655 91980).

[10] During a related hearing on December 15, 1995, the Panel announced the decision herein indicating it was based upon or analogous to the legal maxim of *de minimis non curat lex* ("the law cares not for trifles"). This maxim "is often, perhaps typically, used ... to denote types of harm, often but not always trivial, for which the courts do not think a legal remedy should be provided." *Hessel v. O'Hearn*, 977 F.2d 299, 304 (7th Cir. 1992). A review of the files and records herein indicates that the maxim is not applicable at this point of the case.

Harold PALMER, Appellant,

vs.

Stan MILLARD, Chris EVANS, Lloyd FERRIER, and
COLVILLE CONFEDERATED TRIBES, Appellees.

Case Number AP94-005, 2 CTCR 14, 23 ILR 6094

3 CCAR 27

[Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Andrea Geiger, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellees.
Trial Court Case Number CV91-11034]

Arguments heard June 24, 1994. Decided March 22, 1996.
Before Presiding Justice Collins, Justice Bonga and Justice Miles

COLLINS, P.J.

This appeal has come before the Appellate Panel consisting of Associate Justices David Bonga, Wanda Miles, and Brian Collins, Associate Justice Pro-Tem. The Panel has been asked to review a decision of the Tribal Court, Wynne, C.J., presiding, which granted the Tribes' Motion To Dismiss a civil action brought by Harold Palmer, Jr.'s for injunction and declaratory judgment and damages.

I. FACTUAL AND PROCEDURAL BACKGROUND

The appellant asserts the following facts in this case.[11] On November 8, 1990, Palmer's three Rottweiler dogs were taken from his fenced yard and destroyed by Animal Control Officer Millard, and Police Officers Evans and Ferrier, all of whom were then employed by Colville Tribal Police Services.[12] Palmer alleges that the officers were acting within their official capacities at the time of the incident.

The enclosure from which the dogs were removed consists of a chain link fence five feet high. There was no adjudication or administrative proceeding in which the dogs were found to be vicious before they were seized and destroyed. According to the Complaint, all three dogs were being kept for breeding purposes. Palmer also contends that a litter of rottweilers was born prior to initiation of this action.

In his First Cause of Action, Palmer seeks damages for violation of his civil rights under the Colville Tribal Civil Rights Act (CTCRA), Title 56. Palmer contends that his dogs were seized and disposed of without proper administrative process, including a finding by the Tribal Court that the dogs were vicious. Palmer contends that the appellees' actions were contrary to the Animal Control Ordinance CTC 11.3, and violated his due process and equal protection guarantees, CTC 56.02(h). Palmer seeks monetary damages for the loss of his dogs.

In his Second Cause of Action, Palmer also seeks damages for violation of his civil rights. CTC 56.02. Palmer contends that the rottweilers were seized and destroyed without notice and without a hearing under CTC 11.3 to determine whether they should be destroyed. He seeks monetary damages for violating his due process and equal protection guarantees under CTC 56.02(h).

In his Third Cause of Action, Palmer seeks a declaration that the actions of the above officers violated his

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[11] Appellant's Complaint For Injunction, Declaratory Judgment And Damages filed February 11, 1991.

[12] The record shows that on October 18, 1990, the three Rottweilers got out of the fenced yard. Subsequently, Palmer's wife was cited for a violation of the Animal Control Ordinance, CTC 11.3.

statutory civil rights under CTCRA and an injunction against the officers and the Tribes for further seizure and destruction of dogs in a similar manner. Palmer also seeks a declaration that the officers' actions violated his due process and equal protection guarantees in applying CTC 11.3 such that the rottweilers were seized and destroyed when they were not in the act of damaging property or causing injury to people. Moreover, Palmer seeks to enjoin the Tribes and the officers from applying CTC 11.3 to seize and destroy domestic animals on the Reservation in a similar manner without notice and hearing. As part of his Third Cause of Action for declaratory and injunctive relief, Palmer seeks monetary damages.

On August 16 1993, the Tribal Court heard a Palmer's Motion For Partial Summary Judgment and the Tribes' Motion To Dismiss based upon the assertion that Palmer failed to state a claim upon which relief could be granted.[13] The Tribes contend that the Tribal Court lacks jurisdiction to entertain the claim. The Tribes contended that, at the time Palmer's dogs were seized and destroyed, the officers were performing law enforcement services under a federal contract between the United States and the Confederated Tribes pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* to provide law enforcement services.[14] Tribes' Memorandum In Support Of Motion To Dismiss at 2.[15] The Tribes argued that the Tribal Court lacked jurisdiction to hear the case and that the Tribes and officers were entitled to protections under the Federal Tort Claim Act (FTCA), 28 U.S.C. § 2671-2680.

The record shows at the prior to filing this matter in Tribal Court and at the time of hearing, Palmer had not filed an administrative claim under 28 U.S.C. § 2675, which, with two exceptions, is a prerequisite to instituting a civil suit for damages against federal employees. On February 3, 1994, the Court granted the Tribes' Motion To Dismiss for failure to state a claim upon which relief could be granted, and Palmer timely appealed.

STANDARD OF REVIEW

This matter was dismissed on grounds which included the contents of the Complaint and additional pleadings filed in support of the Motion To Dismiss. The Parties stipulate that appellate review should be the same as that for summary judgment. Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Tribe's Response Brief at 3. Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*. *Colville Confederated Tribes v. Naff*, APCvF 9312001-12003, [2 CTCR 08, 2 CCAR 50, 22 ILR 6032] (1995).

III. DISCUSSION

A. Claims for Damages

Palmer's First, Second and part of his Third claims are tort actions for monetary damages. The exclusive means for a plaintiff to bring a common law tort claim for damages against a federal employee acting within the scope of his employment is through the Federal Tort Claim Act (FTCA), 28 U.S.C. §§ 2671-2680. Because the FTCA constitutes a waiver of sovereign immunity by the United States, the notice requirements established by the

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[13] The Tribes' motion corresponds to a 12(b) (6) motion under FRCP 12(b) (6) for failure to state a claim. We have previously held that Federal and State rules of civil procedure do not apply to actions brought in Tribal Court.

[14] The correct citation is P.L. 101-512, Title III, § 314, 104 Stat. 1959.

[15] The Tribes refer to attached contracts which were approved by the Colville Business Council. The attachments were not included as part of the appellate file. Presumably, the contracts referred to are copies of federal-tribal Self-Determination contracts for law enforcement services in effect on November 8, 1990.

Act are strictly construed. 28 U.S.C. § 2675. *Cizek v. United States*, 953 F.2d 1232 (10th Cir. 1992). A jurisdictional prerequisite for initiating a civil lawsuit under FTCA is the filing of an independent, separate administrative claim with the appropriate federal agency for review and possible settlement. *McNeil v. United States*, 508 U.S. 106, 113 S.Ct. 1980, 1981-82, 124 L.Ed. 2d 21 (1993); *Brady v. Smith*, 686 F.2d 466 (9th Cir. 1981).

The Act provides two exceptions to the mandatory filing of an administrative claim where the federal employee violated the United States Constitution or a statute of the United States under which an action for damages against an individual is authorized. 28 U.S.C. § 2679(b) (2).

Tribal employees performing services under contracts authorized under the Indian Self-Determination and Education Act, when acting within the scope of their employment, are deemed employees of the Bureau of Indian Affairs. 25 U.S.C. § 450f, P.L. 101-512, Title III, § 314, 104 Stat. 1915, 1959. That section also provides:

> After September 30, 1990, any civil action or proceeding brought hereafter against any **tribe, tribal organization, Indian contractor or tribal employee** covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the FTCA... (Emphasis provided)

Id. Thus, if the officers were acting within the scope of their employment at the time the described incident occurred, each of the named defendants, including the Confederated Tribes, would be deemed as federal employees or federal contractors. In addition, this civil action would be deemed an action against the United States.

In response to the *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), the Congress enacted the Federal Employees Liability Reform and Tort Compensation Act. P.L. 100-694, § 6, 102 Stat. 4564, 28 U.S.C. § 2679(d) (1). The Westfall Amendment to the FTCA, in part, reinstated pre-*Westfall* federal employee immunity to common law tort actions. The Act also provides for removal of actions commenced in state court to the federal district court and substitution of the United States as defendant in cases where the federal employee acted within the scope of his employment. The remedy is exclusive, precluding any other civil action for damages against the federal employee. The Westfall Amendment also makes it clear that the exclusive remedy provision under the Act does not extend to constitutional torts or to actions brought under another federal statute. 28 U.S.C. § 2679(b) (2). See, *Woods v. McGuire*, 954 F.2d 388 (6th Cir. 1992) .

The appellees did not forward this matter to the United States Attorney General for a scope of employment certification consistent with 28 U.S.C. § 2679(c). Palmer argues that the burden rests with the appellees, not the claimant to forward the claim for a scope of employment certification, and because the appellants have not done so they have lost FTCA immunity through substitution of the United States and removal to federal court. 28 U.S.C. § 2679(d) (1), (2). Palmer further contends that because the Appellees failed to seek a scope of employment certification, the Tribal Court should have concluded that the Tribal officers acted within their personal capacity and retained jurisdiction over the case.

Thus, we are faced with a situation in which, on one hand, the appellees did not seek a scope of employment certification and on the other, Palmer did not name the United States as defendant or exhaust his administrative remedies under § 2675. Regardless of a determination by the Attorney General that a federal employee was acting within the scope of his employment, under the facts of this case we believe filing an independent administrative claim remains a jurisdictional prerequisite to filing suit.

In *Jackson v. United States*, 789 F.Supp. 1109 (D. Colo. 1992), the court dismissed an action commenced against a federal employee after it had been removed to federal court and the United States was substituted as defendant. There the court held that a plaintiff cannot avoid the procedural requirements of FTCA by suing the individual federal employee rather than the United States. The court explained that a diligent plaintiff can usually determine whether the tortfeasor is a government employee, but not whether the attorney general will issue a scope

of employment certification. "We think it would be extraordinary if a plaintiff could improve his procedural position by bringing his action against the wrong party." *Id*. at 111, quoting *Bradley v. United States*, 856 F.2d 575, 578 (3rd Cir. 1988), *vacated on other grounds,* 490 U.S. 1002, 109 S.Ct. 1634, 104 L.Ed.2d 150 (1989), *on remand,* 875 F.2d 65 (3rd Cir. 1989).

In the cases involving tribal employees performing services under 25 U.S.C. § 450f, the claimant must file an administrative claim with the Bureau of Indian Affairs. Palmer did not do so prior to commencing suit in the Tribal Court. Therefore, even it the Tribal Court had jurisdiction under the FTCA to entertain a lawsuit for damages against the named defendants, the suit was barred by the appellant's failure to satisfy the requirements of 28 U.S.C. S2675(a).

Moreover, the appellant's reasoning is at odds with *Bencenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990), which held that removal jurisdiction under 28 U.S.C. §1442(a) (1), and Sections 1441 and 1443(1) is limited to removal of those actions commenced in state court. Following its holding in *Basso v. Utah Power & Light Co.*, 495 F.2d 906 (10th Cir. 1974), the court held that removal jurisdiction does not extend to actions brought in tribal court. Based upon the reasoning set forth in the seminal case of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) at 349, the court held that until Congress extends removal jurisdiction of Federal courts to tribal court actions, the Federal courts may not exercise jurisdiction over them. *BencentI* at 780.

The appellant next argues that the officers' actions fall within an exception for FTCA in that they committed a constitutional tort. 28 U.S.C. § 2679(b) (2) (A). Palmer contends that the officers' actions in seizing and destroying his dogs violated Chapter CTC 11.3 and the due process and equal protection guarantees afforded under CTC 56.02(h). While Palmer acknowledges that FTCA extends personal liability to federal employees who commit a tortious acts in violation of the United States Constitution, he argues that the same principle should apply to violations of his statutory civil rights under Tribal Law. Palmer also contends that violation of a tribal statute should result in personal liability for the officers based upon a second exception to employee immunity under FTCA. 28 U.S.C. § 2679(b) (2) (B).

1. Violation of the United States Constitution

The Federal Tort Claim Act specifically excepts the requirement of filing of an independent administrative claim with the appropriate federal agency in cases which a federal employee violates the United States Constitution. 28 U.S.C. § 2679(b) (2). In Tribal Court, federal constitutional protections extend to individual Indians only to the extent incorporated by the Indian Civil Rights Act. *Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir. 1987). It has long been recognized that the United States Constitution is not binding on Indian Tribes. *Talton v. Mayes*, 163 U.S. 376 (1896). That fundamental principle of tribal sovereignty applies to statutes enacted by the Colville Business Council and to the administrative process followed by tribal agencies applying the law, and to proceedings before the Tribal Court.

We have previously held that statutory due process and equal protection guarantees under the Indian civil Rights Act are not coextensive with similar protections afforded under the Bill of Rights. *St. Peter v. Colville Confederated Tribes*, [AP93-15400, AP93-15507-10], 1 CTCR 75, [2 CCAR], 20 ILR 6108, 6109-10 (1993). As emphasized in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), tribal forums are available to vindicate rights created under ICRA; however, we do not read FTCA as providing a constitutional basis for an action under the Act. The Federal courts agree. See also, *Nero v. Cherokee Nation of Oklahoma*, *supra* at 1462.

Significantly, the Indian Self-Determination and Education Assistance Act provides:

Nothing in this Act shall be construed as...

> (1)affecting, modifying, diminishing, or otherwise impairing sovereign immunity from suit enjoyed by an Indian tribe.

25 U.S.C. § 450n(1). At most, such contracts contain a limited waiver of immunity authorizing the United States to seek indemnification against the tribe. 25 U.S.C. § 450f(c) (3) (A), (B).

In that regard, the court in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989) observed:

> A third party who is injured by a BIA agent could bring an action against the government under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), or the Federal Tort Claim Act. The government could then bring a claim against the Tribe, pursuant to the Tribe-BIA contract seeking indemnification. The Tribe, in turn, would call upon its insurer to indemnify the Tribe for its liability to the government. At that juncture the insurance company would be precluded from asserting that it has no duty to indemnify the government because of tribal immunity.

Id. at 1347, n.4.

Thus, it appears that the officers and Tribes' immunity with regard to Palmer's theory of constitutional tort requires that any such action be brought against the United States, not the individual officers and the Tribes. Moreover, Palmer's contention that the statutory due process and equal protection guarantees under CTCRA should be treated as a constitutional tort is contrary to the view adopted by the United States Supreme Court, which refused to imply a third exception to FTCA employee immunity. *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). This view is entirely consistent with the principle that,"unlike constitutional violations, there is no per se divestiture of sovereign immunity when statutes or regulations are violated while an agent is pursuing his authorized duties." *United States v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986).

2. Violation Of A Federal Statute

The violation of a federal statute, standing alone, does not create a cause of action under FTCA. Federally imposed obligations, whether general or specific, do not provide a basis for suit under the Act. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980); *Younger v. United States*, 662 F.2d 580, 582 (9th Cir. 1981). The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 does not abrogate tribal sovereign immunity with respect to its due process and equal protection guarantees. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. See also, *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462-63 (10th Cir. 1989).

The appellant has not directed the Court's attention to, and the Panel is unaware of, any Federal statute under which a civil action for damages could be maintained against the Tribes or the individual officers in Federal court under the facts of this case. Unless there is an express waiver of the Tribes' sovereign immunity or congressional authorization for such suit the Court is without jurisdiction. *Kennerly v. United States*, 721 F.2d 1252, 1258-59 (9th Cir. 1983). Moreover, the Federal courts have held that nothing within the Section 102(c) of the Indian Self-Determination Act, 25 U.S.C. § 450n(1), constitutes a waive of tribal sovereign immunity. *Evans v. McKay*, 869 F.2d *supra* at 1347.

We conclude, as the Tribal Court did in *Kiser v. Carter, et al.*, CV90-1282 (Colv. Tr. Ct. 1991), that the Court lacks jurisdiction to hear Palmer's tort claims as the subject has been pre-empted by federal law.

B. CLAIM FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Palmer seeks a declaration by the Court that CTC 11.3 violates Palmer's civil rights. Palmer also seeks a declaration that the actions of the officers violated CTC 11.3 and CTC 56.02(h) of the Tribal Law and Order Code and to enjoin the Tribes and the officers from similar acts of seizing and destroying animals without first going

through an administrative process involving the Tribal Court.

The Colville Tribal Civil Rights Act, CTC 56.03, provides a right of action, under limited circumstances, for declaratory and/or injunctive relief against any executive officer or employee of the Colville Tribes, or any employee or officer of any governmental agency acting within the jurisdiction of the Colville Tribal Court. The Confederated Tribes has waived sovereign immunity for the limited purpose of seeking declaratory and injunctive relief in connection with the due process and equal protection guarantees enumerated in CTC 56.02(h). The Tribes immunity is not waived for purposes of seeking monetary damages. CTC 56.05. Nor does CTCRA apply to laws of the Confederated Tribes which do not violate the rights enumerated in the act. CTC 56.06.

The Tribes argue that Palmer's request for declaratory and injunctive relief is no more than a component of his damages claim. Tribe's Response Brief at 13. The Tribes also argue that Palmer lacks standing to challenge CTC 11.3 as applied to other persons on the Reservation. Similarly, the Tribes assert Palmer lacks standing to seek injunctive relief because he does not allege that he owns other dogs which could be seized and destroyed in a similar manner. However, it appears that at the time of bringing this action, Palmer owned offspring of the deceased rottweilers.

We note that Palmer's Third Cause of Action for equitable relief is tightly inter-woven with his claim for monetary damages and for that reason we are inclined to agree with the Tribes. However, because Palmer raises serious questions concerning the enforceability of the Animal Control Ordinance and procedural issues concerning the seizure of domestic animals, the Panel concludes that the issues should be addressed.

The doctrine of judicial standing requires that the person seeking relief show a direct and palpable injury. *Warth v. Selden*, 422 U.S. 4990, 95 S.Ct. 2197, 45 L.Ed.2d 343, 354-56 (1975). The Panel concludes that Palmer has standing to seek equitable relief on his own behalf.

1. Whether the Statute, as applied, Violates Palmer's Civil Rights

Palmer contends that Chapter 11.3 of the Tribal Law and Order Code violates his right to due process because no administrative process in place under which his dogs could be declared "vicious dogs" or seized and destroyed by the Tribes or the officers.

The appellant is correct in that Title 11.3 sets out no administrative process for a dog to come within the definition of the term.

> A "vicious dog" is any dog that when unprovoked:
>
> > inflicts bites on a human or a domestic animal either on public or private property, or
> >
> > chases or approaches a person upon the street, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, **or any dog with a known propensity, tendency or disposition to attack unprovoked to cause injury or otherwise to threaten the safety of humans or domestic animals.** (Emphasis provided)

CTC 11.3.01(d) (1), (2). The statute also does not require that a procedure be promulgated through administrative rule making or by the Tribal Court by which a dog can be declared vicious for purposes of Chapter 11.3. However, based upon the statutory definition of the term "vicious dog", the Panel concludes that the owners of such animals are given adequate notice as to when their dog's behavior falls within the meaning of the term. The Panel also concludes that no formal administrative or judicial finding is required for an dog with "known propensity, tendency or disposition to attack unprovoked" to being treated as such under CTC 11.3.[16] It is clear to the Panel that Palmer

[16] In contrast with the law of some other jurisdictions which allow a dog one free bite, the Business Council's intent in dispensing with judicial

was aware that Tribal officials considered his dogs to fall within the definition long before they were destroyed. Affidavit of John Dick, *Infra*.

In order to lawfully keep a vicious dog within the Reservation, the owner must keep the dog in a proper enclosure.

> Proper enclosure of a vicious dog means, while on the owners property, a vicious dog shall be securely confined indoors or in a securely enclosed and locked pen or structure, suitable to prevent the entry of young children and designed to prevent the animal from escaping. Such pen or structure shall have secure sides and a secure top, and shall also provide protection from the elements for the dog.

CTC 11.3.01(e). Thus, it is clear that the owner of a vicious dog is not only required to keep the animal securely enclosed, but to ensure that the enclosure be designed to keep children and the unwary from entering and being harmed.

Tribal Law is also clear that keeping a vicious dog on the Reservation is unlawful except as follows:

> No person shall keep, own or possess within the boundaries of the Colville Indian Reservation any vicious dog unless muzzled and restrained by a substantial chain or leash and under the physical restraint of a responsible person or confined in a proper enclosure as defined in Section 11.3.01(e) in such a way as to prevent it from biting any human being...

CTC 11.3.04.

While Tribal law requires owners to keep vicious dogs under the most stringent statutory standards, the law also imposes a duty upon the owner to kill their dog if it is found to have killed livestock or other domestic or game animal. The owner must destroy the dog within 48 hours after receiving notice from the owner of stock or other domestic animal killed or the Animal Control Authority. CTC 11.3.06. If the owner fails to timely destroy the offending dog, the statute allows the Animal Control Authority to do so. *Id.*

The provisions of Chapter 11.3, when read together, show that the Business Council has little tolerance for dogs causing personal injury or property damage. Tribal law requires that owners of offending dogs be held liable for damages caused by their animal without proof that the dog is vicious or otherwise has a propensity for mischief. CTC 11.3.07.

The Animal Control Authority is authorized to immediately confiscate and destroy vicious dogs not maintained in a proper enclosure as described in CTC 11.3.01(e) or outside of such enclosure or not properly restrained. CTC 11.3.12(c), (d). It is implicit from reading Chapter 11.3 in its entirety that Tribal law does not recognize a property interest in vicious dogs. It is equally clear that the Tribes may exercise its regulatory authority to protect the health, safety and welfare of the residents of the Reservation by destroying such dogs.

The facts adduced at hearing clearly show that Palmer's rottweilers had a history of depredations on other dogs and biting residents in the community. Palmer's dogs had a history of creating such problems in the community for more than two years prior to being destroyed. It also appears to the Panel that Palmer had been repeatedly warned by Tribal Police to properly confine the animals. Palmer was waned if the dogs were not properly enclosed or outside of an impoundment cellar, they would be destroyed. Further, it appears that Valerie Palmer complained of police harassment with regard to the type of restraint and insurance coverage required by the police. Affidavit Supporting Defendant's Reply Brief - John Dick.

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process for establishing that a dog has a propensity for causing harm is also reflected in CTC 11.3.07, concerning liability of owners for damages caused by their dogs.

The file does not show that Palmer instituted an action for equitable relief against the Tribes in response to the above requirements. However, the record shows that during October, 1990, more than two years following the first report that one of Palmer's dogs bit a member of the community, and after being repeatedly warned to properly confine the dogs, the rottweilers again escaped from Palmer's property. The five foot chain link fence on Palmer's property was not a suitable barrier to confine Palmer's dogs. Palmer's fenced yard also did not comply with the requirements of a "proper enclosure" for a vicious dog. CTC 11.3.01(e).

The Panel concludes, under the facts of this case, and under CTC 11.3.12 and CTC 11.3.01(e), the appellants did not violate CTC 11.3 by destroying Palmer's dogs without additional notice and an administrative or judicial hearing. We further conclude that Palmer maintained no protectable property interest in his dogs which were not kept or owned in compliance with the above statutory requirements.

The Panel rejects Palmer's argument that CTC 11.3 is not enforceable with regard to its application to the facts of this case. This is not a case in which the owner is being cited for basic licensing of a dog and no dog licenses are issued by the Tribes. The Panel further concludes that CTC 11.3 does not violate Palmer's right to due process and equal protection under CTC 56.02(h). In reviewing the facts contained in the record below, we conclude that Palmer had a statutory notice of the requirements to maintain such dogs on the Reservation and failed to comply with them.

For the reasons stated above, it is hereby ordered that the Tribal Court's order dismissing the instant case is affirmed.

Gary WATERS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP94-012, 2 CTCR 19, 23, ILR 6120

3 CCAR 35

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-17005]

Arguments heard March 25, 1995. Decided May 20, 1996.
Before Presiding Justice Baker, Justice Bonga and Justice Miles

BAKER, P.J.

Gary Waters appeals from a Judgment and Sentence entered pursuant to a jury verdict rendered March 10, 1994, finding him guilty of battery in violation of CTC 5.1.04. The charges arose out of an incident alleged to have occurred January 1, 1994.

The defendant assigns error to the Tribal Court's denial of his motion for a mistrial arising out of what he asserts were three instances of prosecutorial misconduct. He also assigns error to the Tribal Court's allowance of a witness whom he submits the Tribes called for the primary purpose of impeaching her. We agree with each assignment of error and, accordingly, reverse the defendant's conviction and remand to the Tribal Court for a new trial.

PROCEDURAL BACKGROUND

Defendant Gary Waters was arrested as a result of an incident which came to the attention of the Colville Tribal Police on January 1, 1994. The police were dispatched to a HUD home in Nespelem as a result of a call from a different Nespelem location, evidently initiated by one T.J. Flett who was, however, not the caller. The incident resulted in the filing of a charge of battery, alleged to have been committed by the defendant against his girlfriend, Jackie LaFountaine.

The defendant was tried by a jury on March 10, 1994. During testimony of the Tribes' first witness, a police officer, the Court ruled that a written statement and oral statements offered by the Tribes and purported to be those of Defendant's girlfriend, Jackie LaFountaine, were inadmissible hearsay. The Tribes' prosecuting attorney attempted, on ten (10) subsequent occasions during his case-in-chief, each of which was in the presence of the jury, to introduce either the written or one or more of the oral statements of Ms. LaFountaine. The Trial Court sustained defense objections each time but denied a defense motion for mistrial.

Also in its case-in-chief, the Tribes' prosecuting attorney called Jackie LaFountaine as a witness and, after eliciting from her the testimony that she did not recall the evening well, that she had signed a statement, but that she could not vouch for its accuracy, attempted to introduce through her a copy of the written statement. A defense objection on hearsay was once again sustained, but, over the defendant's objection, the prosecuting attorney was allowed to impeach Ms. LaFountaine by asking her whether she remembered being hit and her foot "stomped" on by Defendant, to which she responded in the negative.

Through subsequent testimony by police officers, the Tribes' prosecuting attorney was allowed--again over

defense objections--to introduce the substance of the prior statements of Jackie LaFountaine as impeachment of her in-court denials of the events described in her statements. All argument as to the admissibility and purpose of this testimony occurred fully in the presence of the jury.

During closing argument, the prosecuting attorney mischaracterized the defendant's closing argument as claiming that the evidence of an injury to Ms. LaFountaine "came from police officers who he [defense counsel] tells you lied about everything else." Defense counsel objected and, outside the jury's presence, again moved for a mistrial. Whereas at oral argument on appeal the prosecuting attorney conceded that his closing argument mischaracterized defense counsel's position on closing argument, at trial, he went so far as to request a "curative instruction" -- not as to his mischaracterization, which he at the time denied having made, but as to what he called defense counsel's "outburst" in response to it. While the Court denied the prosecuting attorney's request, it issued a mild curative instruction as to the mischaracterization, in spite of finding that to do so would call undue attention to the problem, and the Court denied the defendant's motion for a mistrial. Instead, the Court, in addition to issuing a brief curative instruction to the jury, employed its own rather unorthodox solution: allowing the defendant's counsel to have the last word on closing argument. In doing so, the Court found that the prosecutor's mischaracterization did not "rise to the level of prosecutorial misconduct."

Also in his closing argument, the prosecuting attorney, in spite of the Court's apparent intent to limit LaFountaine's prior statements to the purpose of impeachment,[17] the prosecuting attorney argued in closing that "it would appear from the testimony at the time and the testimony today by Mr. Waters" that Mr. Waters was not in danger and that "from the testimony of the officers concerning what they were told that night and the statements as they were given to the officers and as the witnesses said they gave them to the officers" that the defendant's self-defense argument should fail. The defendant, however, failed to object to the Tribes' usage of this testimony, although he assigns error to it on appeal.

ASSIGNMENTS OF ERROR

The defendant's remaining assignments of error,[18] in a somewhat different order than presented by defendant, are as follows:

1. That the Tribes engaged in prosecutorial misconduct by repeatedly seeking to introduce testimony previously ruled to be inadmissible hearsay.

2. That the Tribes called Jackie LaFountaine primarily for the improper purpose of impeaching her, and that the Court should thus have disallowed her testimony altogether.

3. That the Tribes engaged in prosecutorial misconduct in its closing argument in referring to evidence admitted solely for impeachment as if it were substantive evidence.

4. That the Tribes engaged in prosecutorial misconduct in mischaracterizing Defendant's closing argument as claiming the police officers were lying.

Based on these assignments of error, the defendant submits he was denied a fair trial.

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[17] It should be noted that the Court gave no instruction to the jury as to the impeachment limitation, although this was its apparent reason for allowing the testimony in. Nor does the record reveal that a limiting instruction was requested by Defendant. The absence of a limiting instruction contributes to our conclusion in this appeal.

[18] The defendant, in his opening brief, withdrew other assignments of error advanced in his Notice of Appeal.

SUMMARY OF DECISION

We conclude that it constituted prosecutorial misconduct for the Tribes' prosecuting attorney to have attempted repeatedly to introduce testimony he knew was inadmissible hearsay. We conclude 'that Jackie LaFountaine was quite clearly called by the Tribes for the improper purpose of impeaching her. We also conclude -- though we do so in dicta, since the defendant did not properly preserve this issue for appeal -- that the Tribes engaged in prosecutorial misconduct in referring, in its closing argument, to evidence admitted for the limited purpose of impeachment as if it had been substantive evidence. And we conclude that the Tribes' mischaracterization of Defendant's closing argument also constituted prosecutorial misconduct. We, finally, conclude that, while if committed alone some of these irregularities might have been harmless error, their cumulative effect was of a denial of Defendant's right to a fair trial in that the jury was allowed -- indeed, encouraged by the Tribes' prosecuting attorney -- to rely on inadmissible hearsay and/or impeachment testimony in finding Defendant guilty as charged. We further conclude that, in repeatedly allowing the bulk of the argument and colloquy as to the reasons for admission or exclusion of the hearsay and impeachment evidence to occur in the presence of the jury, the Court compounded the effect of the prosecuting attorney's misconduct and thus denied Defendant a fair trial.

We, accordingly, reverse and remand to the Tribal Court for a new trial in accordance with this opinion.

DISCUSSION

A. Repeated Attempts to Introduce Evidence Already Ruled Inadmissible Hearsay Constituted Prosecutorial Misconduct.

Defendant's Assignment of Error No. 2 submits that the prosecuting attorney's repeated attempts to introduce the hearsay statements of Defendant's girlfriend, Jackie LaFountaine, made on the night of Defendant's arrest, were offered with the knowledge of their inadmissibility with the design of unfairly prejudicing the defendant; thus they not only constituted prosecutorial misconduct, but also provided grounds for a mistrial.

We begin our analysis of this issue by first noting that the Trial Court's sustaining of Defendant's hearsay objection is conceded by the Tribes to have been correct under Federal Rule of Evidence 801(c).[19] The Colville Tribal Code's express provision on the parameters of allowable evidence in criminal trials seems to grant considerable latitude to the Tribal Court in admitting and excluding evidence. Specifically, CTC 2.6.02 provides:

> 2.6.02 Evidence
>
> The court shall not be bound by common law rules of evidence, but shall use its own discretion as to what evidence it deems necessary and relevant to the charge and the defense.

Yet the code also requires the charge to be proven beyond a reasonable doubt and that the defendant be "afforded a full opportunity to present his defense." CTC 2.6.03. This "Trial Procedures" Chapter of the "Criminal Actions" Title of the Code goes on to say, in CTC 2.6.08, that "[a]ll additional procedures set out in this Code will be

[19] We note that, in any event, the Tribes has neither appealed the Trial Court's hearsay ruling nor found fault with it in its brief. This is in spite of the reference in its brief to CTC 1.6.03(5), the Spokesman's Oath, implying that there was a good faith argument for offering the evidence.

followed in any criminal action to the extent that they are applicable."

Of course, nowhere in the Code has the Tribal Business Council expressly adopted any established body of evidence rules, and the only Rules of Court set forth in the Code are in Chapter 4, which sets forth only 27 quite generalized provisions touching on such matters as "Conduct" (CTC 8.1.01), "Time" (CTC 0.1.02), "Criminal/Civil Recording Tape Retention" (CTC 4.1.12), "Impanelling the Jury" (CTC 0.2.01), "Jury Instructions" (CTC 4.3.01 - .05), "Appeal" (CTC 0.3.0S), and the like. Only two of Title 4's provisions might provide any guidance on matters of evidence. One of these is found at CTC 4.1.11, "Applicable Law", which reads as follows:

> In all cases the Court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.

We have noted previously the conflict of the wording of the above section with that of CTC 3.4.03, also entitled "Applicable Law," but contained in Chapter 3.4 which is entitled "Civil Procedure." It reads:

> In all civil cases the Court shall apply, ill the following order of priority, any applicable laws of the Colville Confederated Tribes, tribal case law, tribal customs, state statute, state common law, federal statues [*sic*.l, and federal custom *[sic.]* law, and international law.

As a reviewing court, we cannot help but wonder whether the Civil Procedure "Applicable Law" section, CTC 3.4.03, was merely overlooked or was actually purposely ignored in the Tribal Business Council's year-later adoption of CTC 4.1.11, since the latter section omits any reference to "tribal customs" or "state statute, although the remaining list of priorities, including, curiously, "state common law", is identical in terms of its order of preference.[20]

Yet, unfortunately, nowhere in these "Applicable Law" sections are "rules of court, whether federal or State of Washington rules, listed. At the same time, it is apparent from the record that the entire trial in the Tribal Court was conducted as if the Federal Rules of Evidence were the governing principles on the issue of evidence or at least on the two issues of hearsay and impeachment. This is in spite of the expression by this Court, in *Condon v. CCT*, No. AP92-15313, [1 CTCR 71, 1 CCAR 70, 20 ILR 6107], that another body of federal court rules, specifically, the Federal Rules of Criminal Procedure, are not controlling in this court system. Rather, as we held in *Condon*, this Court must review the proceedings below in light of whether the Tribal Court provided "adequate constitutional safeguards to fair process within the framework of the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq*.[,] and the Colville Tribal Civil Rights Act, Title 56.02." *Condon v. CCT*, *supra,* at 5.

We note that the hearsay rule has some basis, at least in the criminal arena, in the Confrontation Clause of the U.S. Constitution, adopted by Congress in analogous form and made applicable to Indian Tribes as the Indian Civil Rights Act, and by the Tribal Business Council as the Colville Tribal Civil Rights Act, CTC Title 56, both of which Acts, as concluded by this Court in *Condon*. *supra,* control, where applicable, the operations of the Colville

[20] This assumes that the reference in CTC 3.4.03 to "federal statues" means "federal statutes" and that the reference to "federal custom law" must mean "federal common law"; however, we are certain all Tribal Court practitioners would welcome a clarification of these points by the Tribal Business Council itself, since we can think of no reason why these two sections should read differently, although they certainly do.

Tribal Court. Indeed, a section in Title 2, namely, CTC 2.6.09, entitled "Civil Rights," expressly provides that "[a]ll accused persons shall be guaranteed all civil rights secured under the Tribal Constitution and federal laws specifically applicable to Indian tribal courts." The language of CTC 56.02 (f) and (h) guarantee the right of confrontation of witnesses and the right to due process by providing:

> CTC 56.02 Civil Rights of Persons Within Tribal Jurisdiction
>
> The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not:
>
> (f) deny to any person in a criminal proceeding the right to be confronted with the witnesses against him ; [or]
>
> (h) deprive any person of liberty or property without due process of law

We conclude that, at least pertaining to the questions presented here as to the admissibility of hearsay and impeachment evidence in Tribal Court criminal proceedings, the Federal Rules of Evidence, and the federal case law interpreting them, are the current law of the Colville Confederated Tribes. We reach this conclusion in part because we detect from the Tribal Business Council an apparent disapproval of state law analogies in directing us, in effect, to ignore state statute, and then to apply "state common law, federal statutes, and federal common law," in that order (CTC 4.1.11). Then, we note that, certainly, "state common law" as to matters of evidence has been all but overruled by the adoption in recent years of the Washington Rules of Evidence, although there is now some state case (i.e., common) law interpreting these rules, which in many cases have simply codified their common law predecessor principles. Yet, since there are no "federal statutes" applicable to the issues of hearsay and impeachment, and since the "federal common law" has also been superseded by the Federal Rules of Evidence, our choice of the federal version of the Rules of Evidence is admittedly based upon the sketchiest of guidance in the language of the Colville Tribal Code itself. Still, we believe that, at least as to the questions presented in this appeal, which involve the hearsay rule and its exceptions, and the use of impeachment testimony, the Federal Rules of Evidence and its case law progeny should be the guiding principles for our analysis[21].

That said, the statements of Ms. LaFountaine which the Tribes sought to introduce were clearly "statement[s] other than one made by the declarant while testifying at the trial ... offered as evidence to prove the truth of the matter asserted," and thus hearsay. FRE 801(c). Nor is any federal hearsay exception advanced by the Tribes at trial applicable to the statements in question, and, as we have stated, *supra,* the Tribal Court correctly ruled the statements inadmissible. *See* FRE 801(d)(l), 803(1), and 803(3) as to the arguments advanced by the Tribes at trial, rejected by the Tribal Court, and conceded by the Tribes on appeal. Otherwise stated in terms of the confrontation clause and CTC 56.02 (f), Defendant asserts that the allowance of the hearsay statements effectively denied the defendant the right to confrontation of Ms. LaFountaine, because of the out-of-court context of the statements offered. The question, then, becomes: Were the prosecuting attorney's ten (10) additional attempts to introduce the statements -- citing the identical grounds which had initially been found lacking by the Trial Court, with all ten (10) attempts and the resulting argument occurring in the presence of the jury -- designed to prejudice

[21] This is not to say that this Court would not welcome the express adoption, by the Tribal Business Council or the Court itself, of a uniform set of court rules, even if it involved simply the wholesale adoption of the FRCP, FRCrP, and/or FRE. One thing is for certain: Our admittedly strained interpretation of CTC 4.I.11 leads us to note how difficult it is to conduct the business of the court without a definitive set of rules on the important topic of evidence, and on other topics as well.

the jury and thus deny Defendant due process of law in violation of CTC 56.02(h)?

We believe the prosecuting attorney's conduct, under the circumstances of this case, is susceptible to no other interpretation. Our conclusion is reached because of the repeated nature of the misconduct, as illustrated by the following excerpt from the prosecutor's direct examination of Colville Tribal Police Corporal Richard Hamilton, after the Court had already ruled inadmissible the Corporal's proffered testimony as to oral statements made by Ms. LaFountaine to him on the night of Defendant's arrest:

Mr. Svaren: Corporal, do you, in fact, recognize that document that's before you?

Corporal Hamilton: Yes, I do.

Q. How do you recognize it?

A. It was a document that I--a statement that I took from Jackie LaFountaine the day of the incident.

Q. Does that document bear any signatures'?

A. Yes, it does.

Q. Whose?

A. My signature, and Jackie LaFountaine's signature.

Q. And did you witness Ms. LaFountaine sign this document'?

A. Yes, I did.

Mr. Svaren: Your Honor, the Tribes offer plaintiff's Exhibit Number 1 into evidence.

The Court: Any objection?

Mr. Rasmussen: Yes, Your Honor, the document is, is hearsay; it's Ms. LaFountaine's statement taken sometime after the previous hearsay which you've already excluded. Additionally, at pretrial in this matter, the prosecution said they would not offer any physical or documentary evidence, so for that reason it also should not be admitted. But especially in this case because it is hearsay.

Mr. Svaren: Your Honor, may the counsel approach the bench, please? In chambers, actually--[22]

The Court: Just a second, please; just a second. My notes of the pretrial indicate that what he's saying is true. Do you have any arguments that you want to make in response to his objection?

Mr. Svaren: Yes, Your Honor. My notes indicate that the question was never asked whether the--by the defense--whether or not there would be documentary evidence introduced. And that the Tribes did not make any statement about what evidence would be introduced.

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[22] The prosecuting attorney seems here to have been attempting to conduct the argument on the evidentiary point outside the presence of the jury; however, a close review of the record suggests he may have desired the discussion of his noncompliance with pretrial hearing representations to occur outside the jury's presence. Nevertheless, the record is unmistakable in that his later, repeated attempts to introduce the hearsay were presented with the distinct flavor of grandstanding. Still, it must be emphasized that it is, in the end, the court's duty to assure a fair trial by not only making the technically correct ruling, as was done here, but also by sparing the jury of the nearly inescapable notion that the objecting party is trying to hide something by raising an objection. Unfortunately, the Tribal Court in conducting this trial allowed numerous discussions to take place in open court in full view of the jury when these discussions should assuredly have been conducted outside their presence. The result of the prosecutor's conduct, and of the court's allowance of it, was unfair prejudice to this defendant.

The Court:	Is that your only response to his objection?
Mr. Svaren:	That's my response to his objection about the pretrial conference, Your Honor, and I would ask that the Court issue a curative instructive statement to the jury that there was no such statement made by the plaintiff at pretrial. As to the statement, Your Honor?
The Court:	Just a second. The Court won't grant a curative instruction, and do you have any other response to his hearsay objection?
Mr. Svaren:	Yes, I do, Your Honor. The statement, once again, is the present sense impression and the existing mental, emotional, and physical condition of that declarant at that time, signed off on by her and therefore authenticated, and passing both authenticity, best evidence and hearsay exception rules.
The Court:	The Court is going to sustain the objection.

The above colloquy, as we have noted, took place entirely in the presence of the jury.[23] Key to our analysis is the point that the Tribes' purported grounds for the evidence's introduction were identical to the grounds stated in conjunction with the Court's previous ruling excluding the testimony. After his ninth attempt to introduce the written or oral statements of Ms. LaFountaine, the prosecuting attorney was admonished by the Court to desist from further attempts to introduce the hearsay. Yet a tenth attempt was made, and the question was withdrawn before an answer was given by the witness. And the prosecuting attorney went so far as to call attention to the unadmitted written statement of Jackie LaFountaine as Corporal Hamilton left the courtroom; this, again, occurred in the presence of the jury.

This behavior constituted prosecutorial misconduct, and the sheer redundancy of the prosecutor's attempts was enough to prejudice the defendant unfairly and to entitle him to a new trial, as our discussion, *infra*, demonstrates.

Once again we note that, on appeal, the Tribes "offers no plausible rationale for the admission of [the excluded] evidence." *State v. Pemberton*, 796 P.2d 80, 83 (Hawaii 1990). Indeed, the Tribes, on appeal, offers no rationale whatsoever. In *Pemberton*, the court noted:

> Defendant alleges numerous acts of misconduct. We find that a number of these acts, while not individually sufficient to warrant reversal, cumulatively prejudiced Defendant to the extent of denying him a fair trial. The trial court was continuously forced to sustain objections by defense counsel due to the prosecutor's repeated attempts to bring inadmissible evidence to the jury's attention ....

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[23] We cannot avoid emphasizing that much of the prejudice to the defendant could have been avoided had the Court conducted its consideration of the parties' arguments outside the presence of the jury. Indeed, the admissibility of the LaFountaine statements could have been determined during a hearing on a defense motion *in limine,* had one been made. In fairness to defense counsel, however, it should be noted that he should have the right to rely on pretrial representations of the prosecuting attorney, who, the Trial Court evidently found, had indicated that there would be no documentary evidence offered at trial on behalf of the Tribes. Perhaps the use of the out-of-court written or oral statements of Ms. LaFountaine would seem to be such an elementary example of the applicability of the rule against hearsay that it is understandable that the prosecution's attempts to introduce them would not be anticipated by defense counsel. Still, this case illustrates how much trouble can be avoided by the use of the motion and hearing *in limine.* At a minimum, though, the Court should have excused the jury from the courtroom during the colloquy on the hearsay objection, thereby avoiding the inadvertent or purposeful inference that the defense had something to hide by objecting to the out-of-court statements.

796 P.2d at 83-84. The facts at bar are indistinguishable, at least in principle. The Tribes' prosecuting attorney attempted a total of eleven (11) times to introduce inadmissible hearsay; ten (10) were after the Court had ruled against the Tribes on its first attempt, After the defendant's first objection was sustained, the prosecuting attorney should have desisted from further attempts to introduce the evidence. Instead, the Tribal Court "was continuously forced to sustain objections by defense counsel" due to these attempts, *id.* What is worse, after the tenth objection, the prosecutor persisted in yet another attempt after being specifically admonished by the court to quit. This was similar to the occurrences at the trial court level in *State v. McLeod*, 740 P.2d 672 (Mont. 1987), where, as here, 'the defendant argued that "by repeatedly forcing his counsel to object to questions about [inadmissible evidence], the county attorney led the jury to believe that he had much to hide, denying him a fair trial." 760 P. 2d at 672. Despite the Tribes' argument in its brief that *McLeod* is distinguishable because it involved a "multitude" of sustained objections to the same inadmissible evidence, we follow the reasoning of *McLeod* and of *Pemberton* in holding that the defendant was effectively denied a fair trial due to this prosecutorial misconducts Otherwise stated, ten attempts to introduce inadmissible evidence after a court's ruling excluding it are enough of a "multitude" to meet *McLeod's* test.

B. The Tribal Court Erred in Allowing the Tribes to Call Jackie LaFountaine as a Witness, Since the Prosecuting Attorney's Sole Purpose in Doing So Was to Impeach Her Testimony.

The Tribes called its first police officer witness before calling Jackie LaFountaine. The prosecuting attorney, as previously described, repeatedly tried to introduce through this first officer witness the substance of what Ms. LaFountaine had allegedly said on the night Defendant was arrested, through each and every witness. Then, when Ms. LaFountaine took the stand, she was not asked what happened on the night in question. Instead, she was asked if she recalled what she had, at the time, stated had happened. The Court sustained another hearsay objection.

The record makes it clear that the prosecuting attorney knew that Ms. LaFountaine was going to testify that she had no recollection of the events of January 1, 1994. Yet the Tribes sought to introduce the version of the facts which she had alleged occurred on the night itself. This was attempted not just through Ms. LaFountaine herself but through other witnesses who were then called to "impeach" her lack of recollection.

Using our previous analysis, we look to the Federal Rules of Evidence and its progeny in formulating a rule on the propriety of calling a witness whom one seeks primarily to impeach, so as to get in otherwise inadmissible hearsay through the "back door", so to speak. As we have stated previously, the hearsay rule makes inadmissible out-of-court statements offered to prove the truth of the matters stated. FRE 801(c). Thus, Ms. LaFountaine's statements made on the night of the alleged incident, being out-of-court statements, offered to prove the truth of what she stated then, are hearsay and inadmissible. If, however, Ms. LaFountaine had testified that completely different events had occurred, the prosecuting attorney would have been allowed to bring up her prior inconsistent statement in order to impeach her credibility. FRE (801)(d)(1).

Such was not the case here, however. Ms. LaFountaine simply stated that, due to her intoxicated state at the time, she had no clear recollection of the events or, for that matter, of what she told the officers had occurred at the time. She went on to say that she could not be sure what she said to the officers was true because she could well

have been speaking out of anger at the time.[24] In short it was apparent from the outset of Ms. LaFountaine's testimony that the prosecuting attorney knew before she took the stand that Ms. LaFountaine would testify as she did.

The defendant asserted that the Tribes' presentation of this otherwise inadmissible hearsay was a ploy to get improper evidence to the jury. His objection was overruled, and not only was the prosecuting attorney allowed to bring in, through Ms. LaFountaine, specific statements she had made to the officers in question; but also, the Tribes proceeded to call other witnesses, including one officer, Charles Dunne, who testified at length to the details of Ms. LaFountaine's statements, both oral and written, made on the night of Defendant's arrest.

FRE 607 does provide that "the credibility of a witness may, be attacked by any party, including the party calling him." Moreover, it is true that "a prior inconsistent statement of the witness may be admitted to attack his credibility even if the statement tends to directly inculpate the defendant." (Citations omitted.) *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir., 1985). See also FRE 801(d)(1). A corollary to this rule, however, is the caveat that "the prosecutor may not use such a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible. *United States v. Miller*, 664 F.2d 94, 97, (5th Cir., 1981), *cert. denied,* 459 U.S. 854, 103 S.Ct. 121, 74 L.Ed.2d 106 (1982) (emphasis in original). All the federal circuit courts to consider the issue have ruled likewise. See, e.g., *Kuhn v. United States*, 24 F.2d 910, 913, *cert. denied,* 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928).

The Tribes called Jackie LaFountaine "solely to present otherwise inadmissible hearsay testimony to the jury under the guise of impeachment," *United States v. Hogan*, *supra,* 763 F.2d at 701. The Tribes "may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule." *Hogan*, at 701. This "'straw man' ploy" *(Hogan*, at 702) succeeded, resulting in a conviction in the case at bar; in the process, the defendant was deprived of a fair trial.

C. The Prosecuting Attorney's References to Impeachment Testimony as if It Had Been Introduced as Substantive Evidence Compounded the Error of Its Improper Admission.

Our ruling as to the improper admission of the hearsay statements of Ms. LaFountaine would lead us to consider favorably the defendant's next assignment of error. However, Defendant made no objection at trial to the prosecuting attorney's argument in closing that "it would appear from the testimony at the time and the testimony today by Mr. Waters" and "from the testimony of the officers concerning what they were told that night and the statements as they were given to the officers and as the witnesses said they gave them to the officers" that the defendant's self-defense argument should fail.

While this issue was not properly preserved for appeal because it was not objected to, we feel it important to give our analysis of the concern it presents on retrial of this case.

Once again we note that, even had the testimony been properly admitted for the purpose of impeachment, the defendant should have requested a limiting instruction, and the Court should have instructed the jury as to the limitation to be applied to the testimony. This was not done. And the prosecuting attorney's remarks -- slip of the

[24] For this same reason, we note, the statement could not have come in under FRE 803(5) as a "recorded recollection, because that rule requires that the witness be able to vouch for the statement's accuracy at the time it was made.

tongue or not -- could have served only to further the error of admitting the testimony. As the Second Circuit Court of Appeals stated in *United States v. Richter*, 826 F.2d 206 (2d Cir., 1987):

> Although the inherent controversial nature of litigation permits substantial latitude in closing arguments of counsel, the prosecutor in a criminal case has a "special duty not to mislead.., and should not deliberately misstate the evidence.

(Citations omitted.) 826 F.2d at 209. We find that the Tribes' prosecuting attorney deliberately used testimony limited to impeachment purposes as if it were substantive proof of the matters stated. As such, compounding as it did the Court's error in admitting the evidence in the first place, this misconduct cannot be said to have resulted in harmless error.

D. The Tribes Engaged in Prosecutorial Misconduct in Mischaracterizing Defense Counsel's Closing Argument as Claiming the Police Officers "Lied."

During his closing argument the prosecuting attorney argued to the jury that the evidence for Ms. LaFountaine's injury "came from three police officers who he [defense counsel] tells you lied to you about everything else." Defendant objected 'to the mischaracterization of his argument and, stating he did not "see any way of curing" the problem created by the mischaracterization, moved for a mistrial. Ruling that the argument did not "rise to the level of prosecutorial misconduct," the Court declined to grant the defendant's motion for mistrial, though ultimately it issued a rather vague curative instruction. The Court also allowed defense counsel to make a supplemental closing argument to clarify that he did not claim the police officers were lying.

First, it should be noted that the prosecuting attorney's argument did, in fact, mischaracterize the defendant's argument. Far from questioning the officers' credibility, defense counsel simply questioned the accuracy of what Ms. LaFountaine told them on the night in question as being influenced by her anger and misplaced blame. But even if the defense had attacked the credibility of the police officers, it would still have been prosecutorial misconduct to have pitted the officers' credibility against the defendant's in his closing argument. As the court stated in *United States v. Richter*, 826 F.2d 206 (2d Cir , 1987), in reversing the conviction of a defendant because the prosecuting attorney submitted in closing argument that the defendant could not be telling the truth unless the government agents committed perjury:

> [P]rosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must by lying. (Citations omitted.) The prosecutor's comments in the instant case are strikingly similar to those that were condemned in *People v. Yant*, 75 A.D.2d 653, 427 N.Y.S.2d 270 (1980) (mem,), There, the court found error in the prosecutor's "statements on summation to the effect that, in order to acquit defendant, the jury would have to find that the officers had committed perjury and risked their careers which totaled over 30 years of service." *Id.* at 654, 427 N.Y.S. 270. See also *People v. lngram*, 09 A.D.2d 865, 370 N.Y.S.2d 327 (1975) *(mem.)* ("the prosecutor improperly argued in summation that an acquittal would be tantamount to a finding that the police officers who testified for the People were guilty of perjury.").

826 F.2d at 209-210.

Nor is State of Washington common (case) law silent on this subject. (See CTC 4.1.11.) In *State v. Stith*, 71 Wn.App. 14 (Div. I, 1993), the prosecuting attorney had remarked in closing argument that the defense counsel was

> "asking you to call the officers liars; that they planted the drugs; that they fabricated this whole thing; ... lied; that this didn't happen, that somehow these officers are willing to just impugn their integrity, risk incredible consequences by acting in a way that's illegal and is offensive ...."

71 Wn.App. at 17. Citing *State v. Stover*, 67 Wn.App. 228, 834 P.2d 671 (1992), review *denied,* 120 Wn.2d 1025 (1993), *State v. Barrow*, 59 Wn.App. 869, 809 P.2d 209, *review denied,* 118 Wn.2d 1007 (1991), and *State v. Casteneda-Perez*, 61 Wn.2d 354, 810 P.2d 74, *review denied,* 118 Wn.2d 1007 (1991), the court in *Stith* said:

> This court has previously determined, and the State concedes, that cross examination or comments in closing argument which seek to compare the honesty of the defendant with law enforcement officials or comments which express a personal opinion of witness veracity are improper.

(Citations omitted.) 71 Wn.App. at 19.

The objection and motion for mistrial in the Tribal Court were met with a finding by the Court that the argument did not "rise to the level of prosecutorial misconduct." This finding was in error, as the remarks made during argument were, indeed, prosecutorial misconduct. As quoted with approval in *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984), the New York court in *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497, 46 L.R.A. 641 (1899), gave the following description of the prosecuting attorney's role:

> Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a *quasi*-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to secure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

102 Wn.2d at 146-147. In the case at bar, the Court did ultimately issue a curative instruction to the jury to "disregard the comment by Mr. Svaren -- regarding Mr. Rasmussen saying that the three officers lied." The Court then applied a rather novel solution of letting defense counsel have another round of argument. We find that this action may have cured the error had the misconduct been a single, isolated instance. Occurring as it did here, as one of numerous attempts to distort and misuse the evidence, its proper remedy was in this case to declare a mistrial.

In other words, because of the other incidents of prosecutorial misconduct, which we have found denied Defendant a fair trial, we need not determine whether the court's single action in failing to grant a mistrial on this

basis constituted, of itself, reversible error. We can say, however, that the record reflects that this instance of prosecutorial misconduct alone may well have affected the outcome of the trial, and we think it important that the mistake not be repeated by prosecutors in future criminal trials in this court system.

SUMMARY

The defendant was denied a fair trial by the actions of the Tribes' prosecuting attorney, who was guilty of prosecutorial misconduct in repeatedly seeking to introduce testimony previously ruled to be inadmissible. The Court erred in allowing in the testimony of Jackie LaFountaine, when the primary purpose for calling her as a witness was to admit improper hearsay through the ploy of impeachment. We note in passing that the error was compounded when the prosecuting attorney again committed misconduct by treating the impeachment testimony as if it were substantive evidence in his closing argument. And, the prosecuting attorney's mischaracterization of Defendant's closing argument as claiming the police officers "lied" was prosecutorial misconduct which should have resulted, under the egregious circumstances of this case, in a mistrial.

For all of the above reasons, and particularly because of the cumulative effect of the errors, the defendant was denied a fair trial .

The defendant's conviction is, therefore, Reversed and the case Remanded for a new trial.

Leann HARGRAVE, Appellant,
vs.
Richard W. BURRIS, Appellee.
Case Number AP96-002, 2 CTCR 61
3 CCAR 47

[Leann Hargrave, Appellant, pro se.
Stephen L. Palmberg, Attorney at Law, Grand Coulee, Washington, counsel for Appellee.
Trial Court case number CV94-14591]

Conference call May 17, 1996. Decided May 21, 1996.
Before Presiding Justice LaFountaine, Justice Fry and Justice Stewart

LaFOUNTAINE, P.J.

This matter came regularly before the Court of Appeals for a conference telephone call among [Presiding] Justice Frank LaFountaine, Justice Elizabeth Fry and Justice Howard Stewart, on May 17, 1996.

After reviewing the records and files herein, and being fully advised in the premises, the Court orders as follows:

It is Ordered that the appeal in the above-entitled matter is hereby dismissed on the following grounds:

(1) the Motion to Appoint a Guardian Ad Litem for Cody J. Burris, A Minor Child, was not properly before the Trial Court at January 12, 1996 hearing, for the following reasons:

(a) the Show Cause-Contempt of Court Hearing on January 12, 1996 was not about said motion;
(b) the appellee’s attorney had not been properly served with said motion before the Show Cause-Contempt of Court Hearing on January 12, 1996, and
(c) the appellant had failed to properly note said motion for a hearing before the Trial Court before the January 12, 1996 Hearing;

(2) because said motion was not properly before the Trial Court on January 12 1996, there is no final court order to appeal; and

(3) the appellant, Leann Hargrave, also failed to perfect her right to appeal by failing to file a notice of appeal within ten (10) days from the date of hearing on January 12, 1996.

It is also noted by the undersigned Court of Appeals justices that the appellant may renew her motion for appointment of a guardian ad litem before the Trial Court if she follows proper court procedures.

It is also noted that Justice Elizabeth Fry will be filing a separate dissenting opinion.

It is So Ordered.

Brian L. CONDON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP93-16290, 2 CTCR 20, 23 ILR 6127

3 CCAR 48

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 93-16290]

Arguments heard March 25, 1994. Decided June 11, 1996.
Before Presiding Justice Collins, Justice Bonga and Justice Miles.

COLLINS, P.J.

The Appellant, Brian L. Condon, brings this matter before the Appellate Panel consisting of Associate Justices David Bonga, Wanda Miles, and Associate Justice Pro-tem Brian Collins for review of his criminal conviction in the Colville Tribal Court. Condon was convicted at jury trial of Possession of an Alcoholic Beverage by a Person Under 21, CTC 5.5.13.[25]

FACTUAL AND PROCEDURAL BACKGROUND

During the late evening hours of June 24, 1994, Condon and his companions gathered to play basketball on an outdoor court located in the Moccasin Flat HUD Housing Area in Omak, Washington, which is located within the Colville Indian Reservation. Condon and his friends were then under age 21. Members of the group were consuming beer while they were playing basketball.

At approximately 2:00 a.m. on June 25, 1994, the Colville Tribal Police were called to the Moccasin Flat Housing Area in response to a reported fight involving a carload of juveniles. The police stopped a car occupied by Condon and his friends. After the occupants exited the vehicle, the police officers discovered that members of the group exhibited telltale signs of consuming alcoholic beverages.

At trial, Sgt. William Evans testified that he detected the odor of alcohol on Condon and that "he appeared to have been drinking." Evans testified that he recognized Condon and knew him to be under 21 from previous contacts. Evans testified that the other members of the group appeared intoxicated. Condon and his companions were arrested and taken to the Omak Police Station where they were individually interviewed. Both Sgt. Evans and Officer Rotter, who interviewed Condon, testified that they smelled alcohol on his breath.

Although Condon denied consuming alcohol, he testified that members of the group drank beer while playing basketball and that containers of beer were in the car at the time of the stop. Both the police and Condon testified that the containers of beer found in the car were unopened. The record does not reflect which member of the group owned the car.

Among the instructions given to the jury, the Court gave the following:

> You are instructed that possession may be either actual or constructive. Actual possession means possession in person, upon the person, and within his actual

[25] CTC 5.5.13 provides in relevant part: any person who, being under the age of 21 year old, shall possess, purchase, consume, obtain, or sell any beer, wine, ale, whiskey or other alcoholic beverage or misrepresent his age for the purpose of buying or otherwise obtaining an alcoholic beverage shall be guilty of Possession of an Alcoholic Beverage by a Person Under 21.

> physical control, of the substance involved. Constructive possession means such dominion and control over a place where the substance was found so as to give a person in possession of such a place the right to complete access to, or disposition of, the substance found.

Jury Instruction No. 5.

The Panel has repeatedly reviewed the taped record from trial. From our review the Panel concludes that defense counsel did not object on the record to the any of the jury instructions given by the Tribal Court, including Instruction No. 5.

The jury found Condon guilty and he was sentenced to pay a fine of $600.00, with $400.00 conditionally suspended upon his compliance with conditions of sentencing.

I. ISSUES

There are two primary issues raised on this appeal. The first is whether there was sufficient evidence adduced at trial to for the jury to convict Condon of the offense. In his Notice Of Appeal, Condon alleges, based upon the evidence presented at trial, that the Court erred by instructing the jury on the theory of constructive possession.

II. DISCUSSION

A. The Offense

The required elements to be support Condon's conviction for Possession of an Alcoholic Beverage by a Person Under 21 are: 1) that Condon was under the age of 21 at the time of the offense; 2) that he possessed, purchased, consumed, obtained or sold an alcoholic beverage; 3) that the offense occurred within the Reservation. CTC 5.5.13. Thus, the prohibited conduct encompassed by the statute includes more than mere possession of alcohol.

B. Sufficiency of Evidence to Support a Conviction

We have previously had an opportunity to review criminal cases in which reversal was sought on grounds that there was insufficient evidence adduced at trial to support a conviction. In *Cora L. Pakootas v. Colville Confederated Tribes*, AP92-15148, [1 CTCR 67, 1 CCAR 65], we held that the Court will not reverse a conviction, based upon sufficiency of evidence, unless "after reviewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Id*. at 4. All reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted most strongly against the defendant. Simply stated, on appeal the appellant must show that, from the evidence at trial, no reasonable jury would have found that he possessed or consumed an alcoholic beverage in violation of the statute.

It is unchallenged that Condon was under age 21 when the offense occurred. It is also unchallenged that the offense took place within the Reservation. Thus, our inquiry is whether there was sufficient evidence presented that any reasonable jury could have found that Condon "possessed, purchased, consumed or sold an alcoholic beverage."

From the facts of this case, the relevant prohibited conduct under CTC 5.5.13 concerns whether Condon "possessed" or "consumed" alcohol. Although there was conflicting testimony at trial as to whether Condon consumed alcoholic beverages prior to his arrest, two police officers testified that they detected the odor of alcohol on Condon's breath and body at the time of arrest and during questioning at the Omak Police Station.

The officers testified that they were in a position to detect the odor of alcohol and to observe the defendant, and it appeared to them that Condon had been drinking. The police officers also testified that there was beer in the automobile in which Condon was riding and that Condon's companions were intoxicated. The officers' testimony

was partially corroborated by Condon, who testified that there was beer in the car when it was stopped. The officers' testimony was further corroborated by Condon's companions, who testified that they had beer in their possession and had been consuming beer.

While there were certain discrepancies in the officers' testimony, we find that their testimony concerning the material points in this case was consistent. The evidence presented at trial was not such that a reasonable jury should have concluded that the officers' testimony lacked credibility and that it should have been given less weight than needed to support a conviction.

Although defense witnesses came forward with testimony that Condon had consumed no alcohol during the night in question and was not generally known to consume alcohol, there was also testimony presented that Condon had, on at least one occasion, consumed alcohol. In addition, there was no evidence presented to show that Condon was an unwilling participant in the group's activities, which included drinking beer, or that he attempted to leave the group when his friends began consuming alcoholic beverages.

C. Consumption

Although the defense witnesses denied that they saw Condon consume alcoholic beverages, there was evidence presented that he had done so. In *Colville Confederated Tribes v. Terry Dean Fry*, Case Nos. 80-3351, 80-3352, 80-3353, [1 CTCR 02] (Colv. Tr. Ct. 1981), the Tribal Court determined that "consumption" is a continuing process which begins when alcohol is swallowed and ends when the substance has been fully metabolized. There is record evidence, from the police officers' testimony, that the smell of alcohol was detected on Condon's breath. Thus, a reasonable inference can be drawn, based on the reasoning in *Fry*, that Condon was then in the process of consuming alcohol. There was also evidence presented that beer could have been made available to Condon and that he was present when his friends were consuming alcohol. We therefore conclude that the evidence adduced at trial was such that a reasonable jury could have found, beyond a reasonable doubt, that Condon consumed alcohol, as well as the remaining elements of the offense.

D. Possession

A conviction for Possession of Alcohol by a Person Under 21 may be supported by proving either one of the Tribe's theories of the case...that Condon either possessed or consumed alcohol. Under the facts of this case, the more complex question presented is whether the jury could have found that Condon possessed alcohol. We have found that Condon's conviction is supported by evidence that he consumed alcohol. Therefore, the inquiry stops there unless other issues are properly preserved for appeal.

In his Notice Of Appeal, Condon contends that the Tribal Court erred by instructing the jury on the theory that he constructively possessed an alcoholic beverage. Condon contends that there was insufficient evidence presented at trial to instruct the jury on the theory of constructive possession.[26]

As we noted above, defense counsel did not object on the record to the instruction before it was given by the Court. Failing to object to a jury instruction before it is given by the trial court constitutes a waiver of the right to later challenge the instruction, and is fatal to preserving the issue for appeal. Therefore, the Panel will not consider Condon's assertion that the Court erred by instructing the jury on the issue of constructive possession of an alcoholic

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[26] The Colville Tribal Court has recognized the doctrine of constructive possession, in that dominion and control over a residence can be used to establish possession of contraband contained within a residence...and gives rise to a duty to keep contraband out. *Colville Confederated Tribes v. Miles*, 89-12666 (Colv. Tr. Ct. 1990). The doctrine was also recognized in *Colville Confederated Tribes v. Clark*, 93-16646; 93-16647 (Colv. Tr. Ct. 1994), as applied to automobiles.

beverage.

For the reasons stated above, it is Ordered that the judgment of the Tribal Court is Affirmed and the matter is remanded to the Tribal Court.

In Re The Welfare of S. M.-C.
E. M. P., Appellant.
Case No. AP94-003, 2 CTCR 21, 24 ILR 6016
3 CCAR 52

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant/Grandmother.
Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for father.
R. John Sloan Jr., Attorney at Law, Omak WA, counsel for minor.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Children & Family Services.
Juvenile Court Case Number J91-10013]

Decided June 21, 1996
Before Presiding Justice Miles, Justice Bonga and Justice Collins

PER CURIAM

This matter came before the Colville Court of Appeals upon Motion for Reconsideration filed by Lin Sonnenberg, representative for Children and Family Services. The Court after reviewing the record and applicable law, made the following decision in this matter.

DISCUSSION

According to Chapter 13.6.02(1) Jurisdiction states:

> (1) The Tribal Court shall have authority, whenever it appears necessary or convenient, to appoint guardians for the person and/or their estates, or for the purpose of actual or contemplated litigation (guardian ad litem) of either minors or persons incompetent by reason of physical or mental sickness or deficiency, advanced age, or chronic use of drugs or alcohol.

Chapter 13.6.03(1) Petition:

> (1) Except as provided in the preceding section, guardianship proceedings shall be initiated by the filing of petition by a relative or other person on behalf of the minor or incompetent, or by a minor himself if over 14 years of age. The Court may initiate proceedings to appoint a guardian if such appointment reasonably appears necessary and no other person has initiated such proceedings.

This Court has determined by utilizing the above mentioned sections of Chapter 13 [that] there is a mechanism for the Tribal Court, a relative, or other person may initiate a petition for guardianship for a minor or person incompetent by reason of physical or mental sickness of deficiency, advanced age or chronic [use] of drugs or alcohol.

DECISION

Based upon the foregoing discussion, this Court denies the Motion for Reconsideration, and remands this matter to Juvenile Court for further disposition by utilizing Chapter 13.6.2(1).

In Re The Welfare of A. children.

D. Z., Appellant.
Case No. AP94-018, 2 CTCR 22, 24 ILR 6019
3 CCAR 53

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Andrea Geiger, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Juvenile Court Case Number J93-12040, J93-12041, J93-12042, J93-12043]

Argued November 18, 1994. Decided June 21, 1996.
Before Presiding Justice Miles, Justice Bonga and Justice Nelson

PER CURIAM

This mater came before the Colville Court of Appeals on November 8, 1994 for Oral Arguments. The appellant was represented by Jeff Rasmussen, Public Defender, and Andrea Geiger, Reservation Attorney, represented the appellee.

The Court, after reviewing the arguments of counsel, the record, and applicable law, made the following finding and decisions in this matter.

REVIEW

On September 27, 1993, the above named Appellant appeared for an adjudicatory hearing in a matter involving her minor children in an intoxicated condition. The Trial Court held D. Z. in contempt of court and ordered her to pay the cost of the morning proceedings and to immediately serve three (3) days in jail.

On May 11, 1994 a Show Cause hearing was scheduled. D. Z. failed to appear and the Trial Court issued a bench warrant, and the hearing was rescheduled for June 3, 1994.

On June 3, 1994 the Trial Court imposed a sanction in the amount of $684.08. D. Z. appeals the order of June 3, 1994.

DISCUSSION

This Court has determined that sanctions imposed by the Trial Court do fall within the statutory civil contempt of the court in accordance with CTC 1.12.03, which states:

> The Court may sentence a person found to be in contempt of court to confinement for a period of not more than six (6) months or pay a fine of not more than $500.00 or both, with costs.

There is a limitation on the fine amount, but the statute does not place any limits on the costs that may be incurred by the defendant. According to the record, the monetary penalty were costs incurred by the Tribe as a result of D. Z.'s contemptuous conduct.

The Court concludes the Trial Court has the inherent power to determine what is a contemptuous act and may act accordingly. The Court finds reimbursement reasonable and the costs are appropriate and the Trial Court did not abuse its discretion in imposing them.

ORDER

The Colville Court of Appeals therefore affirms the decision of the Trial Court and remands back to the Trial Court for hearing to determine the appellant's ability to pay such costs.

In Re the Welfare of D.A.
L. F., Mother/Appellant
Case No. AP95-024, 2 CTCR 24, 24 ILR 6111
3 CCAR 54

[Dianna Caley, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for the mother/Appellant.
Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minor.
Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for the father.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Juvenile Court Case Number J93-12036]

Arguments heard March 15, 1996. Decided June 21, 1996.
Before Presiding Justice Bonga, Justice Chenois and Justice Miles

BONGA, P.J.

This matter came before the Appellate Panel of Justice Edythe Chenois, Justice Wanda Miles and Justice David Bonga for Oral Arguments on March 15, 1996. In attendance at the hearing included Lin Sonnenberg, counsel for Appellee/Children and Family Services (CFS) and Steven Aycock, spokesperson for the Minor. Counsel for the mother and counsel for the father were not present. Following consultation with counsel who were present the Appellate Panel decided to proceed so that the juvenile matter could be expedited. After hearing oral arguments and after reviewing the file and records the Appellate Panel has decided to Affirm the decision of the Trial Court to place the Minor Child at Excelsior Youth Center. The Appellate Panel Denies the Appellee's Motion to Extend Time To File Brief and the Motion to Respond to Issues Raised at Oral Argument.

STATEMENT OF THE CASE

On September 27, 1993, the Tribal Juvenile Court, after an Adjudicatory hearing, entered Findings of Fact, Conclusions of Law and an Order of Minor-In-Need-Of-Care due to alcohol and controlled substance abuse, frequent runaways and the inability of her parents to control her behavior.

On January 27, 1994, the Juvenile Court following a Disposition hearing entered a Dispositional Order placing the minor in the custody of the Child Welfare Services Department of the Tribes and physically placed the minor at Excelsior Youth Center, a residential juvenile treatment facility in Spokane, Washington and at Yellow Cloud, a juvenile residential facility in Nespelem, Washington. At a June 30, 1995 review hearing the minor was found to continue to be a minor-in-need-of-care. Custody was continued with Child Welfare Services (now referred to as Tribal Children and Family Services) and the Tribal Juvenile Court continued her physical placement at Yellow Cloud. On August 26, 1995 the minor ran away from her placement at Yellow Cloud when she was taken to an outing in Spokane by her relatives. The minor's whereabouts and activities remained unknown for six weeks. On October 12, 1995 the minor contacted her father who returned her to Yellow Cloud in Nespelem, Washington. A placement hearing was held upon a motion by CFS to change the physical placement of the minor from Yellow Cloud to Excelsior, the residential juvenile treatment center in Spokane, Washington. After hearing testimony from the minor's caseworker regarding the minor's background and history, including the fact that the only physical placement which appeared to have helped the minor previously was her placement at Excelsior, the Tribal Juvenile Court determined that placement of the minor at Excelsior was in her best interest and ordered her placed at that juvenile facility. That Order is the subject of this appeal.

DISCUSSION

ASSIGNMENT OF ERROR 1

The Court's placement of the minor D.A. at an institution which is not physically proximate to her family and which has not been approved by the Colville Tribes is contrary to the law.

While it is true that CTC 12.7.28 does not authorize placement of children in institutions it also does not state that a preferred placement requires the Court to physically place the minor A. in an institution which is physically proximate to her family. The appellant did not bring forth any evidence to support the argument that the placement at Excelsior was harmful due to Excelsior's lack of physical proximity to minor A.'s family. To the contrary the hearing brought forth the position of the father who supported the placement of the minor A. with Excelsior and stated in his brief that the appellant's contentions were without merit and that the decision of the Tribal Juvenile Court at the Placement hearing held on October 24, 1995 should be affirmed.

The Appellate Court also finds that CFS is the agent of the Tribes in all children's dependency cases. As such agent, it has authority to approve placements and recommends to the Court placements of the minors in its care, custody and control. Through the prior placement of the minor A. at Excelsior, the Court and the parties were well aware that CFS, and thus, the Tribes, had approved Excelsior as a treatment facility for minors who met the criteria for care at Excelsior. The Appellate Court therefore finds no merit in Appellant's Assignment of Error 1.

ASSIGNMENT OF ERROR 2

The Court erred in finding a change of circumstances had taken place when all the testimony presented indicated there had been no change in the case.

The Appellate Panel has a difficult time in understanding the allegation of Assignment of Error 2. It is the opinion of the Appellate Panel that there was sufficient evidence for the Juvenile Court to base a decision on. While it is correct that, pursuant to CTC 12.7.28, a showing of changed circumstances must be made prior to the Tribal Juvenile Court ordering a change in the minor's placement, the Appellate Panel finds there was extensive testimony of the witnesses regarding the minor's background and the minor's most recent runaway from Yellow Cloud that clearly showed such changed circumstances. The Panel finds that there was sufficient evidence for the Juvenile Courts to reach its decision.

ASSIGNMENT OF ERROR 3

The Court erred in placing the minor in a facility without any information or any study of the facility and the services available there by the caseworker.

The record shows that the minor was placed before at the Excelsior Youth Center in 1994. During the placement, the minor attended court review hearings, reports from Excelsior staff were filed with the Court and Excelsior staff testified before the Court. Thus, the Appellate Panel holds that due to the extensive interaction between the Juvenile Court and Excelsior the Juvenile Court became highly familiar with the services provided by Excelsior be they therapeutic, educational or cultural. Furthermore, the father in his brief stated that the initial stay at Excelsior produced positive attitude, understanding and behavioral changes in the minor which resulted in the minor being physically placed in the father's home.

In addition the requirement of CTC 12.7.27(d), which is the subsection covering placement of a minor in off-reservation facilities, is only that the facilities be "designated by the Court." In its Order of Placement of October 24, 1995, the Tribal Juvenile Court clearly designated Excelsior as the placement for the minor. Therefore the Appellate Court finds Assignment of Error 3 is without merit.

ASSIGNMENT OF ERROR 4

The parents in this matter were not given adequate notice of the placement hearing.

The appellant asserts that inadequate notice was given to the parents of the minor of the October 24, 1995 Change of Placement hearing as required by CTC 56.02(h) and the Indian Child Welfare Act 25 U.S.C. 1912. The Appellate Panel does not agree with Appellant's contention that the parents of the subject minor lacked proper notice. The record indicates that this case was initially set for a Change in Placement hearing for October 23, 1995. The record further indicates that the mother's counsel requested a continuance which was granted for a 24-hour period. No counsel objected to the length of the continuance. At the October 24, 1995 hearing counsel for the mother was present and did not request a further delay. The Juvenile Court proceeded with the Change of Placement hearing.

The appellant's assertion that the Indian Child Welfare Act 25 U.S.C. 1912 requires that parents be given a minimum of ten days notice of any placement hearing is also inapplicable. As this Court has previously held the Tribes have not wholly adopted the Indian Child Welfare Act, but has incorporated those provisions that are applicable. CTC 12.5.08.

Tribal law specifically defines procedures to be implemented for a dispositional hearing in CTC 12.7.23, 12.7.25 and 12.7.26. Tribal law also specifically references the process for modifying a dispositional order, CTC 12.7.28, and the procedures to be implemented for the modification hearing. CTC 12.7.29-30. Under Tribal law the October 24, 1995 hearing was a modification hearing of the original Dispositional Order. Thus there was no need for the application of the Indian Child Welfare Act. Therefore the Panel holds that the Juvenile Court's actions were proper under Tribal law in supporting the best interests of the child.

ASSIGNMENT OF ERROR 5

The Court erred in placing the child in an institution where the uncontradicted testimony was that the child's cultural needs were not met at that facility. (CFS)

In this case, care, custody and control of the Minor-in-need-of-care was awarded to CFS by the Juvenile Court at a Dispositional hearing held on January 27, 1994. That custody Order has remained in effect. CFS has authority to approve various placements and recommends to the Court placements of the minors in it care, custody and control. The record shows that the minor was placed before at the Excelsior Youth Center. Testimony during the hearing indicated that Excelsior's philosophy would be to encourage the minor to participate with cultural functions which is contrary to the position stated in Assignment of Error 5. The Appellate Panel does not believe that Assignment of Error 5 is valid.

It is So Ordered the decision of the Colville Juvenile Court is Affirmed and the motions by the Appellee are Denied.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Frederick CLARK, Appellee.

Case Number AP94-024, 2 CTCR 23, 8 NALD 7006

3 CCAR 57

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Jeffrey Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court case number 93-16048]

Motion hearing held January 13, 1995. Decided June 21, 1996.
Before Presiding Justice Miles, Justice Bonga and Justice McGeoghegan

PER CURIAM

This matter came before the Colville Court of Appeals on January 13, 1995 for a Motion to Dismiss the Appeal. The appellant was represented by Lin Sonnenberg, Tribal Prosecutor, and Jeffrey Rasmussen, Public Defender, representing the appellee.

The Court after reviewing the arguments of counsel, the record, and applicable law, made the following finding and decision in this matter.

DISCUSSION

The Court has reviewed Chapter 1.9.03, which states:

> 1.9.03, Notice of Appeal
> Within ten days from the entry of judgment, the aggrieved party may file with the Court written notice of appeal, and upon giving proper assurance to the Court, through the posting of a bond or any other way that will satisfy the judgment if affirmed, shall have the right to appeal, provided the case to be appealed meets the requirements established by this Code or by Rules of Court.

This section allows for the aggrieved party to file an appeal. This Court finds that prosecution can be an aggrieved party and does have the right to appeal. Sections of Chapter 1.9.02(a) Grounds of Appeal, provides limited access by the prosecution.

The Colville Court of Appeals, therefore, denies the Motion to Dismiss and orders a briefing schedule by both counsels to be submitted to the Clerk of Court within two (2) weeks of this notice of this decision. Then this Court will set a date for Oral Arguments on the merits of this matter.

William D. COLEMAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP94-002, AP94-016, 2 CTCR 25, 23 ILR 6188

3 CCAR 58

[Stephen L. Palmberg, Attorney at Law, Grand Coulee Washington, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15405]

Arguments heard October 28, 1994. Decided July 10, 1996.
Before Presiding Justice Collins, Justice Bonga and Justice Chenois

COLLINS, P.J.

These consolidated criminal appeals have come before the Appellate Panel consisting of Associate Justices David Bonga and Edythe Chenois, and Associate Justice Pro-Tem Brian H. Collins for review on separate appeals filed by William D. Coleman. The appellant seeks review of the Judgment and Sentence following his conviction for the misdemeanor offense of Escape.[27] The appellant also seeks review of Tribal Court's Order Denying Writ Of Habeas Corpus and an oral order of the Court regarding sentencing practices in Tribal Court as applied to his release from jail. The Appellate Panel, having reviewed the file, the record below, the briefs submitted by the parties and heard oral argument of counsel, now Affirms the decisions of the Tribal Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

William D. Coleman was convicted of the crime of Escape at bench trial on January 28, 1993. Coleman was released from custody on March 1, 1993 and was returned to the Tribes' custody in November, 1993. On January 11, 1994, Coleman was sentenced to a maximum jail term of 180 days and a maximum fine of $2,500.00, with the fine payable in full prior to release from jail. The jail term was ordered to run consecutive to any other incarceration he was serving on other offenses.[28] At sentencing, Coleman was not awarded credit for presentence jail time served. The sentencing judge ordered both counsel to file memoranda on the amount credit that should be awarded to Coleman for presentence jail time served and note the issue for hearing.

On January 12, 1994, Coleman's counsel filed Statement Re Time Of Incarceration, in which he contended that, as of January 11, 1994, Coleman had served 205 days in jail. On January 21, 1994, Coleman filed Notice Of Appeal And Application For Stay (AP94-002). Coleman alleged that the Court erred by sentencing him to more than the maximum jail term allowed by statute for the crime of Escape. Coleman also contends that the Trial Court erred by requiring him to pay the maximum fine prior to release from jail, and ordering that he serve out his fine if he was

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[27] CTC 5.4.06

[28] The Judgment and Sentence entered January 12, 1994 states in pertinent part:

The defendant is sentenced as follows on the aforementioned offense:

A. The defendant shall pay a fine in the amount of $2,500.00, with none of the fine amount suspended conditionally, the remaining amount of $2,500.00 is due and payable prior to release from jail.

B. The defendant shall serve 180 days in a jail approved for use by the Colville Tribes, with no days suspended conditionally, the defendant is not given any days credit for time already served at this time. The parties shall file written calculations regarding the proposed jail time credit and note for hearing before this court will grant credit for time served. The remaining 180 days of jail time shall be served as follows: Immediately, and **consecutive** to any other jail time. (Emphasis provided)

unable to do so. The Application For Stay was granted before the issue of credit for time served was heard. The case was later remanded for the Tribal Court to determine the amount of credit Coleman should be given for time served before sentencing.

On remand Coleman applied to the Tribal Court for a Writ of Habeas Corpus contending that he was being held longer than the maximum jail sentence and maximum fine (served at $30.00 per day) authorized for the crime of Escape. Coleman contends that the maximum authorized confinement for the crime of Escape, includes 180 days jail time and 83 1/3 days for the $2,500 fine, for a total of 203 1/3 days.[29] By counsel's calculations, Coleman served 205 days in jail prior to sentencing, which he contends is 25 days more than the maximum jail sentence authorized for the offense.

In his Application For Writ Of Habeas Corpus Coleman advanced the following argument:

> No order was entered in the above cause concerning whether incarceration time served by the Defendant in the above cause should be concurrent or consecutive with any other incarceration time until sentencing of the Defendant on January 11, 1994 and thus all incarceration prior to January 11, 1994 must be concurrent with any other incarceration of the Defendant.

Coleman's counsel cited no authority in support of the above argument.

On appeal Coleman asserts (1) absent a prior order determining the defendant/appellant's presentence jail time in the instant case was to be served consecutive to any other incarceration, his pre-sentence jail time should run concurrent to other incarceration he was then serving, and (2) that Coleman had already served more than the maximum sentence allowed for the crime of Escape. Supplemental Brief Of Appellant at 4.

In its May 2, 1994 Order Denying Writ Of Habeas Corpus, the Tribal Court held that Coleman was not then being held on the instant charge and that his jail term in Case No. 92-15405 had been completed. The Court also directed the Tribes to file an affidavit setting forth the time the defendant had left to serve in Cases 92-15405, 92-15407, 92-15408, 91-14143 and 91-14144, and to specify Coleman's release date.

On May 13,1994, the Tribes filed its Motion For Reconsideration And To Vacate Order Of May 2, 1994. In its motion and accompanying affidavit, the Tribes provided a detailed accounting of jail time Coleman served in the above criminal matters. The Tribes asserted that Coleman had 159 days left to be served in the instant case. At the conclusion of a hearing convened on the Tribes' motion, the presiding judge ordered that the Tribes file a proposed order consistent with the following oral order from the bench:

1. That there is a presumption that sentencing in the Colville Tribal Court is consecutive, not concurrent.
2. That jail time served shall be credited as first in time...and that the first days served should be applied to the first offense sentenced.
3. That Coleman shall receive credit for jail time served between September 5 through October 5, 1993 as follows:
    a. 7 days already credited on Case No. 92-15408,
    b. 23 days credit shall be allowed for Case Nos. 9215407 and 92-15408.
4. The Tribes' proposed order shall include a proposed exit date if Coleman continued as a jail trustee.
5. Trustee good time credit shall be awarded at a rate of one-third of time remaining to be served.

The record shows that counsel for the Tribes did not file the above order as directed by the Court. Instead, on July 15, 1994, the parties filed a Stipulation And [Proposed] Order Re Release, which provided that Coleman

[29] Our calculations of the maximum authorized incarceration for the crime of Escape is 263 1/3 days confinement. This is at variance with the calculations by Appellant's counsel. See Application For Writ Of Habeas Corpus at 2.

would be released from custody on July 19, 1994, and that his fine would be converted to community service. The Court entered the Order on July 21, 1994.

II. ISSUES

The Appellant raises the following issues on appeal:

1. Whether jail time served prior to the date of criminal sentencing in Tribal Court, absent a prior order to the contrary, is presumed to run concurrent to any other jail term then imposed.

2. Whether, at the date of sentencing, the appellant served a longer jail term than the maximum authorized by statute.

3. Whether the Tribal Court may require that a defendant pay a criminal fine before being released from custody after completion of a jail term or serve out the fine if he is unable to do so.

Because the parties have stipulated to a release date to converting Coleman's fine to community service, the Court will address the Tribe's argument that the above issues are now moot.

III. DISCUSSION

A. Presumption Of Consecutive Sentences

The Panel first notes that Coleman's statement of the case is at variance with the clear language contained within the Judgment and Sentence. See, Appellant's Statement Of The Case, Supplemental Brief Of Appellant at 4. In view of the Court's order which clearly stated that the jail sentence would run consecutive to other incarceration, *supra*, n.1, it appears to the Panel that the appellant has misstated the case. The case was remanded to determine how much credit Coleman should be given prior to sentencing in order to properly frame the issues for appeal.

In light of CTC 4.1.11[30], and our holding in *St. Peter v. Colville Confederated Tribes*, [1 CTCR 75, 2 CCAR 2], 20 ILR 6108, 6115-16 (1993), concerning sentencing authority of the Tribal Court, we see no basis for restating the Panel's analysis of the law on concurrent and consecutive sentencing.[31]

This Court has held that the rule of lenity does not apply to sentencing in the Colville Tribal Court. *Id*. While other courts have adopted the rule pursuant to the federal and state constitutions, the Tribal Court is not constitutionally or statutorily bound to adopt the rule of lenity. We have held that there is no presumption that sentencing in Tribal Court is concurrent, as is the case in the federal courts and state courts. We decline to limit the Tribal Court's sentencing discretion absent legislative direction in the applicable criminal statute to the contrary.

The appellant asks the Panel to review the Tribal Court's oral order which directed the Tribes' counsel to prepare an order setting forth Coleman's release date and elaborating on sentencing standards in Tribal Court. We also note that the Tribes' counsel did not file the proposed order as directed, but rather filed a stipulated order regarding the time of Coleman's release from jail and conversion of his fine to community service. The Tribes now argue that the Stipulation and Order resolving sentencing issues in the instant case moots all issues raised concerning the Court's May 2, 1994 Order.

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[30] In all cases the Court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated tribes, tribal case law, state common law, federal statutes, federal common law and international law.

[31] The decision to impose concurrent or consecutive jail sentences upon an offender convicted of multiple offenses is left to the discretion of the Tribal Court. *Id*. at 6116.

The Court is constitutionally required to interpret and enforce the laws of the Confederated Tribes. Constitution Of The Confederated Tribes Of The Colville Reservation, Amendment X. The Court does so through adjudication of cases or controversies. Thus, if an issue is resolved before it makes it way to the Court for adjudication, there is no controversy and the matter is moot.

The origins of the Court of Appeals' authority differs from that of federal appellate courts. Therefore, this Court does not hold that the limitations applicable to the federal courts through Article III of the United States Constitution apply to the Tribal and Appellate Courts of the Colville Tribes.[32]

Because the sentencing issues raised in the Tribal Court's May 2, 1994 Order have been resolved through stipulation of the parties after this matter was brought before the Court of Appeals, the Court concludes that those issues are now moot.

B. Whether Coleman Served A Longer Jail Term Than Provided For By Statute.

In his Notice Of Appeal, the appellant contends that he served more jail time in the instant case than allowed by statute. Coleman also contends that, absent an express order to the contrary by the sentencing judge, his presentence incarceration in the instant case should run concurrently with any other jail term then being served.

In reviewing the history of the instant case and other criminal matters involving Coleman referred to above, we note that Coleman was serving jail terms as a result of being sentenced in other matters during his presentence incarceration in the instant case. Although Coleman contends that he was held for 205 days prior to imposition of sentence in the present case, he was being given credit for time served on his sentences in other cases. If the Panel accepted Coleman's contention, he would be given credit for presentence incarceration in the instant matter for jail time he was then serving as part of sentences in other cases.

We reject the appellant's argument for two reasons. If the Panel adopted the above reasoning, we would hold, in effect, that the rule of lenity not only applies to criminal sentencing in Tribal Court, but it applies retroactively to the criminal sentences which have been imposed and are then being served by the defendant. Assuming that a defendant was then serving a jail term which exceeded the maximum punishment applicable to the offense for which he was being held prior to sentencing, application of the theory advanced by the appellant would divest the sentencing judge of his or her discretion in sentencing in both cases. Adopting the appellant's view would also mean that the Trial Court would only retain sentencing discretion if, before ordering the defendant to be held in jail following arrest, the trial judge specified that pretrial incarceration would run consecutive to other jail time being served. The appellant has provided the Panel with no authority in support of adopting the sentencing practice for use in the Tribal Court, and we decline to do so.

From our review of the Judgment and Sentence entered in the present case, we conclude that it is without question that the sentencing judge intended to give Coleman credit for any presentence incarceration he was entitled as part of the consecutive jail term imposed. It was within the Court's discretion to direct counsel to file memoranda following sentencing to ensure that Coleman would receive credit for presentence confinement which was not being served as part of a sentence in other criminal matters.

C. Payment Of Fine Before Release From Custody

The appellant next challenges the provision of the Judgment and Sentence requiring him to fully pay his

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[32] Under United States constitutional principles, the concept of a case or controversy implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. *Muskrat v. United States*, 219 U.S. 346, 357, 31 S.Ct 250, 254, 55 L.Ed. 246 (1911). A case is not justiciable if it is hypothetical, abstract, academic or moot. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct 461, , 81 L.Ed. 617 (1937). See also, *Campbell v. Wood*, 18 F.3d 662, 680 (9th Cir. 1994).

fine before being released from custody. The Panel notes that in the Order Denying Writ Of Habeas Corpus dated May 2, 1994, the Court modified Coleman's sentence by allowing him to perform community service instead of paying the fine prior to release from jail.

The record shows that Coleman's sentence was modified prior to serving out his fine, and that he was released from jail after serving the maximum jail term, less time credited for good behavior. Thus, the legal question raised by Coleman related to his being required to pay his fine prior to release from jail is now moot. The issue whether Coleman rights were violated by requiring him to serve out his fine, which would result in incarceration beyond the maximum jail time allowed by statute, is not properly before the Court.

For the reasons stated above, the Judgment and Sentence and Order Denying Writ of Habeas Corpus are Affirmed. This matter is remanded to the Tribal Court for further proceedings to determine whether the case should be closed.

Seymour SENATOR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP95-002, 2 CTCR 32

3 CCAR 63

[Steven Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Administrative Court Case Number A93-13064]

Decided July 24, 1996.
Before Presiding Justice Bonga, Justice LaFountaine and Justice Stewart

BONGA, P.J.

The Appellate Panel of Justice Frank LaFountaine, Justice Howard Stewart, and [Presiding] Justice David Bonga convened twice by telephonic means to consider this Case on April 2 and 10, 1996.

The justices after reviewing the file and information submitted to the Court finds merit in Appellant's position and the Tribes position in support of the defendant that in the interests of justice this matter should be Remanded and Dismissed.

FACTS

According to the record the defendant received a citation for Driving While Intoxicated and refused the breathalyser in connection therewith in December 1993. The citing officer promptly filed a notice with the Colville Tribal Court to initiate procedures to suspend defendant's driving privilege for said refusal, and the Court promptly issued a Notice of Suspension and sent it to the Colville Confederated Tribal Police for service upon Defendant. Although the defendant was readily available at all times relevant, this Notice of Suspension was not served upon the defendant for nearly a year, resulting in Defendant ignoring the Notice after Defendant had consulted with the Tribal Probation office following receipt of the same.

DISCUSSION

Tribes have inherent authority to establish their own dispute resolution systems. The Constitution of the Confederated Tribes of the Colville Reservation decrees that it's "object and purpose shall be to promote and protect the interests of the Colville Indians..." Article I, Constitution and By-Laws of the Confederated Tribes of the Colville Reservation (CCT Constitution). The judiciary was also created by the Tribal Constitution in Amendment X to "interpret and enforce the laws of the Confederated Tribes.." (CCT Constitution), which this Panel understands to mean the judiciary is to make decisions that maintain law and order on the Reservation in a manner that is considered fair and just by the Tribal membership.

The Appellate Panel is of the opinion that the Colville Appellate Court has discretion in reaching a decision. The Panel believes that the unique facts of this case, which precludes the holding in this case of establishing a far reaching precedence, support the Panel's decision that substantial justice has not been done, as the Panel believes that the long delay in developing this case has hampered the defendant's right to justice. The Panel hereby Remands this case with instructions to Dismiss the case and reinstate Mr. Senator's driving privileges.

In Re The Welfare of E. A., J. A., J. A.

CCT Children and Family Services, Appellants.
Case No. AP96-015, 2 CTCR 64
3 CCAR 64

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellants.
Steve Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minors.
Julianna Repp, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Mother.
Juvenile Court Case Number J95-14032, J95-14033, J95-14034]

Hearing held October 18, 1996. Decided November 18, 1996.
Before Chief Justice Dupris, Justice Chenois and Justice Nelson

DUPRIS, C.J.

This matter came before the Appellate Panel of Chief Justice Anita Dupris and Justices Edythe Chenois and Dennis Nelson on 18 October 1996 for an Initial hearing. Appellants were represented by Tribal Children and Family Services counsel, Lin Sonnenberg. No other parties appeared.

The Court, having reviewed the files and records herein, now finds that the Trial Court's order of dismissal insufficient findings concerning whether the dismissal with prejudice was in the best interest of the minors. Now, therefore,

It is Ordered, Adjudged and Decreed that the Order of Dismissal is hereby vacated, and the case is remanded to the Trial Court to hold another hearing on the motion to dismiss and on whether such dismissal is in the best interest of the minors.

It is Further Ordered that the Trial Court shall set a new date for the dismissal hearing on remand.

Doris PICARD, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP95-009, 2 CTCR 57

3 CCAR 65(1)

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Administrative Court Case Number A95-15006]

Decided November 18, 1996.
Before Chief Justice Dupris, Justice McGeoghegan and Justice Stewart

DUPRIS, C.J.

This case came to the attention of the Panel of the Colville Tribes Court of Appeals sitting on this case. The Court, after reviewing the record and finding the appellant was directed to file her initial brief in this matter by September 4, 1996, and the appellee's response was due by October 8, 1996, and the appellant's reply brief was due October 16, 1996. The Court found that no briefs have been filed in this matter nor have any extensions been requested, and further finds this indicative that the appellant has abandoned her appeal. Based on the foregoing findings, the Court finds cause to dismiss the appeal, now, therefore

It is Ordered, Adjudged and Decreed that this Appeal is dismissed because of Abandonment of Appeal.

Denise HERMAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES,

Appellee.

Case No. AP95-012, 2 CTCR 58

3 CCAR 65(2)

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 95-18116]

Decided November 18, 1996.
Before Chief Justice Dupris, Justice Nelson and Justice Stewart

DUPRIS, C.J.

This case came to the attention of the Panel of the Colville Tribes Court of Appeals sitting on this case. The Court, after reviewing the record and finding the appellant was directed to file his initial brief in this matter by August 26, 1996, the appellee's response was due by October 1, 1996, and the appellant's reply brief was due by October 9, 1996. The Court found that no briefs have been filed in this matter nor have any extensions been granted beyond the schedule set above, and further finds this indicative that the appellant has abandoned his appeal.

The Court finds further that the Appellant's reference to Trial Court briefs does not constitute a "filing" of

an appellate brief. Rather, it shows disrespect to the Appellate Bench, and such references shall not be considered by the Court. Based on the foregoing findings the Court finds cause to dismiss the Appeal, now, therefore,

It is Ordered, Adjudged and Decreed that this Appeal is dismissed because of Abandonment of Appeal.

David LOUIE Jr., Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP95-013, 2 CTCR 59

3 CCAR 66

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-17479, 94-17481, 94-17482]

Decided November 18, 1996.

Before Chief Justice Dupris, Justice McGeoghegan and Justice Miles

DUPRIS, C.J.

This case came to the attention of the Panel of the Colville Tribes Court of Appeals sitting on this case. The Court, after reviewing the record and finding the appellant was directed to file his initial brief in this matter by October 21, 1996. The Court found that no briefs have been filed in this matter nor have any extensions been granted beyond the schedule set above, and further finds this indicative that the appellant has abandoned his appeal.

Based on the foregoing findings, the Court finds cause to dismiss the Appeal, now, therefore

It is Ordered, Adjudged and Decreed that this Appeal is dismissed because of Abandonment of Appeal.

Gerald SEYMOUR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

AP95-028, 2 CTCR 60

3 CCAR 67(1)

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 95-18381 to 95-18391]

Decided November 18, 1996.
Before Chief Justice Dupris, Justice Bonga and Justice Miles

DUPRIS, C.J.

This case came before the Colville Tribes Court of Appeals for a status hearing. The Court, after hearing the arguments of the parties and reviewing the record and applicable law, found cause to enter the following orders, now, therefore

It is Ordered, Adjudged and Decreed that:

1. The appellant's Motion to Dismiss because the initial hearing was not held within 45 days of filing the Notice of Appeal is denied for cause.

2. The appellant's Motion to Dismiss because the case is moot is granted, and this matter is dismissed.

Brian CONDON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP93-16290, 2 CTCR 56, 23 ILR 6127

3 CCAR 67(2)

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided December 18, 1996.
Before Presiding Justice Collins, Justice Bonga and Justice Miles

COLLINS, P.J.

This matter came before the Court on the Appellant's Motion to Reconsider filed June 25, 1996. The Panel ordered briefing on specific issues raised in the appellant's Motion. In it's Briefing Schedule on Motion to Reconsider, the Panel ordered the appellant to file and serve his Opening Brief on or before August 30, 1996. The appellant failed to file his Opening Brief; therefore, the Panel finds that the appellant's Motion has been abandoned and should be denied. Accordingly;

It is Hereby Ordered that the appellant's Motion to Reconsider is Denied. This matter is remanded to the Trial Court for further proceedings consistent with the Opinion entered June 11, 1996.

In Re the Welfare of A.S.

A.S., Minor/Appellant.
Case No.AP95-016, 2 CTCR 46, 24 ILR 6026
3 CCAR 68

[Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the Minor/Appellant.
Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Mother.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Tribes.
Juvenile Court Case Number J95-14107]

Decided January 17, 1997.
Before Presiding Justice Nelson, Justice Bonga and Justice Fry

NELSON, P.J.

On July 28, 1995, A.S. was adjudicated a Minor-In-Need-Of-Care by Judge Mary T. Wynne. The Order of Disposition was entered on August 31, 1995.

A.S. appeals the Order of Disposition on the grounds that no remedial services were provided her mother before A.S. was taken into custody and that such services are mandated by 25 U.S.C. 1912(d) by authority of CTC 12.5.08.

ISSUES

The issues that are before the Panel: 1) whether the reference to state law in 25 U.S.C. 1912(d) should be interpreted to mean Tribal law and 2) whether remedial services should be provided to a parent before a child can be declared a minor-in-need-of-care.

DISCUSSION

The applicable provisions of the Indian Child Welfare Act (ICWA) are incorporated into Tribal law by CTC 12.5.08. It provides:

> "Indian Child Welfare Act:
> It is intended that the provisions of this Title be consistent with and carry out the purposes of the Indian Child Welfare Act, 25 U.S.C. 1901 *et seq.* All applicable provisions of that Act shall be deemed to be incorporated by reference in this Title and in the event of conflict between provisions of that Act and this Title, provisions of that Act shall apply."

A.S. contends that 25 U.S.C. 1912(d) requires "a showing that services were provided to the parent" before a child can be declared a minor-in-need-of-care.

The section states:

> "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under **State law** shall satisfy the court that active efforts have been made to provide **remedial** services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved successful."
> (emphasis added).

The appellee Colville Confederated Tribes (CCT) responds that the provisions referring to State law do not apply to the Tribe and that remedial services need not always be provided the parent(s). 25 U.S.C. 1912(d).

Counsel for A.S. contends that Section 1912(d) is applicable to Tribal Court despite the clear reference to

actions under state law. She urges the Panel to hold that state law means Tribal law in this instance and that any other interpretation would be "too narrow" - that such an interpretation would render meaningless much if not all of the ICWA as it applies to Tribal Court.

During its deliberations the Panel looked to CTC Title 9 for guidance. Title 9, the Tribal Motor Vehicle Code, incorporates certain laws of Washington State into Tribal law. The incorporated provisions are portions of Title 46 of the Revised Code of Washington (RCW)[33]

Particularly relevant to the issue before us is CTC 9.1.06 Definitions which provides:

> "As contained in the above-cited motor vehicle laws (various RCW chapters in Title 46), 'highways', 'state highways', and 'public highways' shall be construed to mean 'all roads, public and private, within the jurisdiction of the Colville Confederated Tribes', and 'county jail' or 'jail' shall be construed to mean 'tribal or other jail authorized by the Tribes to receive prisoners.' Reference to any court shall be construed to mean the 'Colville Tribal Court.'

A similar section in the Title under consideration (CTC Title 12), is much less comprehensive. It states that "any term not defined in this Title shall be understood to have the meaning ascribed to it in the definitions section of the Indian Child Welfare Act (ICWA), P.L. 95-608, 25 U.S.C. 1901, *et seq.*" CTC 12.2.14.

ICWA does not define "state law." Its plain meaning is the law of the state in which an action is brought. The Panel declines to interpret "state law" as "Tribal law" without clear direction from the Colville Business Council.

We therefore hold that 25 U.S.C. 1912(d) is not applicable to Tribal Court proceedings.

REMEDIAL SERVICES TO THE PARENT(S)

Our holding that 25 U.S.C. 1912(d) is inapplicable in Tribal Court proceedings would normally render consideration of the second issue no longer necessary. However, whether remedial services shall be provided a parent before a child can be declared a minor-in-need-of-care is a significant issue and should be addressed to provide guidance to the parties.

The gist of A.S.'s argument is that remedial services be provided the parent(s) and child before he or she can be taken into custody or declared a minor-in-need-of-care because it is mandated by 25 U.S.C. 1912(d). Notwithstanding that we have held 25 U.S.C. 1912(d) to be inapplicable to Tribal law, such a requirement is not required for the obvious reason that it would dictate a process which would not always be in the child's best interests.

The appellee CCT aptly describes why this is so:

> "Common sense dictates that the type of active efforts to provide remedial/rehabilitative services to a family will be different in every case. For example, if the case involves a parent abusing alcohol and physically abusing a child, the focus of services will be on the parent's problems (in addition to keeping the child safe and providing services to the child regarding any problems the child may have as a result of the abuse/neglect). In another example, if the child is older and has some unusual and/or serious mental/medical problems, the focus of services may be upon keeping the minor safe and healthy, while providing rehabilitative services to the minor and appropriate services to the parent(s)." Page 3, Appellee's Response Brief.

[33] RCW Chapters 46.04, 46.37, 46.44, 46.48, and RCW 46.20.343, 46.52.020, 46.52.030, 46.52.035, and 46.52.040.

The appellant has provided no authority other than the Congressional Record to bolster her argument that the Tribes must provide services for the entire family before a child can be removed from the family home. The Panel holds that this procedure would not always be in the best interests of the child.

For the above stated reasons, the Order of Disposition of the Trial Court is Affirmed.

Cecil MICHEL, Appellant

vs.

COLVILLE CONFEDERATE TRIBES, Appellee.

Case Number AP95-027, 2 CTCR 38, 24 ILR 6072

3 CCAR 70

[Julianna Repp, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 93-16220, 93-16221]

Arguments held December 20, 1996. Decided January 29, 1997.
Before Chief Justice Dupris, Justice Chenois and Justice Nelson

PER CURIAM

This matter came before the Court of Appeals on December 20, 1996 for Oral Arguments. The appellant appeared only through his spokesperson, Julianna Repp, Tribal Public Defender's Office. The appellee appeared through its spokesperson, Wayne Svaren, Tribal Prosecutor's Office. The Appellate Panel, after reviewing the record submitted, the legal authorities, and after hearing the arguments of counsel, found for the appellee in this matter. This holding is based on the following brief opinion.

OPINION

Personal Assurance Agreement Forfeiture

The appellant's first argument is that the Trial Court erred in ordering forfeiture of the Personal Assurance Agreement (PAA)[34] for bail signed by Ms. Watt and Ms. Kuehne on behalf of the appellant.

The Appellate Court's initial inquiry to the appellant is: what is the basis of the defendant's standing to argue the validity of the PAA forfeiture?

Appellant could not point to any legal authority that would give him standing to argue the issue for the PAA signers. The appellee argued conflict of interest and potential ethical questions if the appellant's counsel were allowed to argue for the PAA signers. We agree.

Neither side disagreed that the PAA signers, if ordered to pay the forfeited bail, would have a potential civil action against the defendant (the appellant in this matter) to recover the amount forfeited and paid by the PAA signers.

[34] CTC §2.5.01, Bail and Bonds - Generally, states, in part: "Bail shall be by cash or **by assurance of two reliable members of the tribes resident within the boundaries of the Reservation who shall execute an agreement** in compliance with the form provided therefor to the effect that they will pay any bail forfeited." [emphasis added]

Based on the foregoing, the appellant's first assignment of error is dismissed. The legal arguments raised by the appellant regarding contract law, and lack of statutory authority to order forfeiture of bail under a PAA agreement are not properly before the Court, and will not be addressed.

FORFEITURE OF CASH BAIL

The appellant's second assignment of error is that the appellant did not receive adequate notice that if he failed to appear for his court date, he would forfeit his $75.00 cash bail. Appellant argues contract law.

The appellee argues the bail statute found at CTC, Chapter 2.5 gives the Trial Court authority to order forfeiture. Furthermore, the appellant signed a "Notice of Court Appearances and Advisement of Rights" form on May 22, 1995 [*see* Court entry #29] in which the appellant acknowledged, *inter alia*, his bail could be forfeited if he failed to appear for his sentencing on July 10, 1995.

This Court is concerned by the lack of adequate briefing on the issues by the appellant. He did not even discuss the existing bail statute; he made reference to some "potential" statute being contemplated by the Tribal Council; and he did not address the Trial Court's authority to interpret and enforce Tribal law as found in our primary law: the Tribe's Constitution. His arguments rest primarily on state contract law. Finally, he argued for parties he does not represent on the issue of the validity of the Personal Assurance Agreement.

When asked directly by the Appellate Bench whether or not the appellant was arguing the Trial Court has authority to develop procedures to enforce the bail statute, the appellant did not have an answer. The answer is, of course. The Tribe's Constitution at Amendment X specifically charges the Tribal Court with the duty to interpret and enforce the laws of the Tribe.

The appellant's arguments of lack of due process are not supported by the record. Quite the contrary, there is more than adequate proof the appellant was given notice of the consequences of his failure to appear for his court hearing.

Based on the foregoing Opinion, the Appellate Court enters the following

ORDER

It is Ordered that the Trial Court’s orders appealed herein are Affirmed and this matter is Dismissed from the Court of Appeals, and remanded to the Trial Court for appropriate action consistent with this Opinion.

Edward CAWSTON, Appellant,
vs.
Cheryl CAWSTON, Appellee.
Case Number AP96-010, 2 CTCR 63
3 CCAR 72(1)

[Edward Cawston, Appellant, pro se.
Cheryl Cawston, Appellee, pro se.
Trial Court Case Number CV 88-8128]

Initial Hearing October 18, 1996. Decided February 21, 1997.
Before Presiding Justice McGeoghegan, Justice Bonga and Justice Chenois

McGEOGHEGAN, P.J.

This case came on regularly for Initial Hearing before the Colville Tribes Court of Appeals on October 18, 1996. The appellant and the appellee failed to appear for the purposes of said hearing to confirm the issues on appeal, establish a briefing schedule, designate a date for oral argument and, address any other matters the parties and the Court deem appropriate for the orderly development of the case.

On the basis of the failure of either party appearing to move the matter forward and a review of the file, the Court finds cause to dismiss the Appeal, now therefore

It is Ordered, Adjudged and Decreed that this appeal is dismissed because of Abandonment of Appeal.

In Re the Welfare of L. S, M. S., and C. S.
Minor Children and their Parents, Appellants.
Case No. AP95-015, AP95-018, AP95-025, AP96-001, 2 CTCR 33, 24 ILR 6112
3 CCAR 72(2)

[Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for Appellant minors.
Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant parents.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Colville Tribes.
Irving Rosenberg, Attorney at Law, Coupeville WA, guardian ad litem.
Juvenile Court Number J88-8033, J88-8034, and J89-9002]

Arguments heard August 2, 1996. Decided March 21, 1997.
Before Presiding Justice McGeoghegan, Justice Chenois and Justice Nelson

McGEOGHEGAN, P.J.

PER CURIAM

This matter came before the Court of Appeals on August 2, 1996 for Oral Arguments. The appellants, minor children, appeared through their attorney, Mr. Steven D. Aycock. The appellant parents of the minor children, G. and L. S., appeared through their attorney, Mr. Stephen Palmberg. The Colville Tribes appeared through its spokesperson, Ms. Lin Sonnenberg, Colville Tribal Prosecutor and, Guardian Ad Litem for the minor children, Mr.

Irving Rosenberg, by telephone conference call. The Appellate Panel, after reviewing the record submitted, the legal authorities, and after hearing the arguments of counsel, issues the following opinion:

INTRODUCTION

On July 12, 1995, Tribal Court Judge Mary T. Wynne, conducted a review hearing on the custody and placement of the minor children, L.S., M.S. and C.S. At the conclusion of the hearing the judge entered her Memorandum Decision. Among her findings, the judge expressed her opinion that termination of parental rights to the minor child, C.S., would be in her best interest. The judge also excluded the minor child, C.S., in a later order, from physical presence at future hearings addressing her circumstances. The appellants appealed the termination recommendation and the exclusion of the minor child, C. S., from future proceedings.

ISSUES

The issues before the Appellate Panel are: 1) Whether, upon the conclusion of a Juvenile Disposition Review hearing, the Court's finding that parental rights should be terminated amends an extant Dispositional Order of the court or, is Res Judicata for subsequent court decisions and/or can be used as Collateral Estoppel in a subsequent court proceeding and, 2) Whether CTC 12.7.20 and CTC 12.7.25 entitles a juvenile to be physically present at all court proceedings affecting him or her.

DISCUSSION

1) The Court conducts juvenile dispositional hearings and review hearings as prescribed under CTC 12.7.27 Dispositional Alternatives. In such hearings, among the determinations the Court may make, CTC 12.7.27(f) provides that the Court may "recommend that termination proceedings begin." And, in a review hearing, the Dispositional Order may be modified only after a hearing to review its dispositional order when the modification involves a change in custody, CTC 12.7.28. In the below proceeding, Judge Wynne expressed her finding "...the Court finds that termination of the parental rights of both parents is in the best interest of the minor, C." Considering the child, C., has been a dependent of the Tribes for over seven years, the judge could easily reach such a conclusion by simply reviewing the record. Nothwithstanding the Court's expression about terminating parental rights, the Court in its written Order from Review Hearing did not order termination of parental rights and, even if the Court had made such a recommendation, a Modification hearing is required to address the issue of changing the extant Dispositional Order to include the Court's recommendation to terminate parental rights. Termination of Parental Rights may only be considered at a hearing for such decision under the provisions of CTC 12.9 *et seq.* where the merits of such matter may be fully determined by the Court. While an earlier Juvenile Court dispositional proceeding may produce facts which may assist a Court in its decision whether to terminate parental rights at a hearing for that purpose, the Court is not bound by such earlier findings. We will provide guidance in this particular case by directing that the lower Court finding, "...that termination of parental rights of both parents is in the best interest of the minor, C." shall not be used *res judicata*, nor may it be used as collateral estoppel at any Parental Rights Termination proceeding involving the minor child, C.S.

2) CTC 12.7.20(c) provides "the minor and the minor's parent, guardian or custodian shall be entitled to introduce evidence, to be heard on their own behalf, and to examine witnesses." The appellants argue that this Code section expresses the child's right to be present at the child's proceedings and prevails over the purpose statement contained in CTC 12.1.01 which states in part "It is the purpose of this Juvenile Code to secure for each child coming before the Tribal Juvenile Court such care, guidance, and control, preferably in his own home, as will serve his welfare and the best interests of the Colville Confederated Tribes". It is uniformly held that substantive decisions

regarding the welfare of a child shall be in the best interests of the child. Welfare of child is paramount consideration in determining custody of child under Juvenile Court law. *Fields, In Re*, 56 Wash. 259 (1909). Tribal Courts have regularly exercised discretion in determining the welfare and what is in the best interests of minor children and, in the best interests of the Colville Confederated Tribes. In this case, the Court expressed a clear awareness of the child's circumstances taking into account her young age and, after reasonable deliberation excluded her from the Dispositional Review hearings. Considering the young age of the minor child, C., and the continuous Court observations, the deliberation and review protections offered the child through CTC, the Court must have discretion to exclude the child whenever the Court so finds that it is not in the child's best interest to be present at certain proceedings affecting his or her life and personal relations. However, the rights of the minor child must be balanced against the detriments which may attend the physical presence of the child in the court's proceedings. We look to the record below to learn whether the Court satisfactorily addressed the pros and cons of the child's presence for any specific court event affecting the child. We are satisfied that the Trial Court made such an informed evaluation based upon long and thorough familiarness with this child's circumstances. We choose not to supplant our evaluation of the facts the lower Court used to reach that conclusion and, acknowledge that the Court below may from time to time either exclude the minor child or include her for her welfare as is in her best interests for any future court proceedings.

CONCLUSION AND ORDER

Based upon the foregoing and limited to this case, the Trial Court's finding that parental rights should be terminated is not a final decision and shall not be used as *res judicata* or raised in a collateral estoppel argument in future proceedings. The Court Affirms the Trial Court's decision to exclude the minor child, C.S., from future court proceedings whenever in the discretion of the Court such exclusion is for the welfare and is in the best interests of the minor and the Colville Confederated Tribes.

Arnie HOLT, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP94-011, 2 CTCR 34, 24 ILR 6110

3 CCAR 75

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Steve Suagee, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 93-16277]

Argued January 13, 1995. Decided March 24, 1997.
Before Presiding Justice Miles, Justice Baker and Justice Bonga

BACKGROUND

On December 2, 1993, the Tribal Court ordered the Colville Tribal Probation and Parole Department to file an updated Pre-Sentence Investigation Report (PSI) in the case of *CCT v. Michel* by January 18, 1994. Sentencing was scheduled for January 25, 1994 at 10:00 a.m. The PSI was not filed until January 25, 1994 at 12:06 p.m., after the aforementioned hearing.

The Tribal Court subsequently issued a summons to the appellant ordering him to show cause why he should not be held in civil contempt for failure to comply with the Court's order directing the filing of an updated PSI. On March 4, 1994, a hearing was held. Upon the conclusion of the testimony of Mr. Ken Bourgeau, Probation Officer and Mr. Arnie Holt, Appellant, the Court found the appellant in civil contempt and imposed a sanction in the amount of $100.00

The appellant filed a Motion for Reconsideration, which was denied on April 26, 1994. The Tribal Court also issued a Stay of Execution of Judgment on May 11, 1994.

DISCUSSION

The Colville Tribal Law and Order Code provides for three (3) separate statutes upon which contemptuous acts may be instituted and pursued. In CTC 1.2.03 it provides for civil remedies; section CTC 5.4.04 sets forth controlling law for criminal contempt actions; CTC 1.5.05 allows the Tribal Court broad authority to adopt all means necessary to carry it's jurisdiction into effect, including any suitable process or mode of proceeding consistent with the Spirit of Tribal Law. Thus, the Tribal Court has the sole discretion which judicial forum is warranted under the circumstances.

Therefore, this Court must determine if the Tribal Court abused it's judicial authority by finding the appellant had violated CTC 1.12.03(3). Also, were the sanctions imposed by the Trial Court justifiable.

This Court concurs with the Trial Court's decision to proceed in the civil forum as opposed to the criminal forum. The appellant's actions are civil in nature not criminal.

CTC 1.12.03(3) dictates there must be a willful disobedience of any process on an order lawfully issued by the Court. There is no dispute that the appellant is the Director of the Tribal Probation and Parole Department and the only person with the authority to assure program resources are allocated in a manner that would assure PSI's were timely filed. The record reflects that the appellant knew his department had previously failed to file PSI's in a timely manner and failed to rectify the situation. Further testimony by Mr. Bourgeau indicated he had on-going talks with the appellant about the difficulty of filing timely PSI reports. The appellant has further acknowledged that the department has rectified the problem by implementing a new tracking system.

For contempt purposes, wilfulness is defined as "a volitional act done by one who knows or should be reasonably aware that his conduct is wrongful," *United States v. Baker*, 641 F.2d 1311, 1317 (1955). The volitional act being the failure to allocate departmental resources in correcting administrative policy in regard to timely filed PSI reports. This Court finds the Trial Court did not abuse it's discretion finding that the appellant's action was willful.

This Trial Court imposed a monetary sanction of $100.00, which may seem punitive on its face. However, CTC 1.12.03 allows for confinement for a period of not more than six (6) months or to pay a fine of not more than $500.00 or both, with costs. *State v. Norlund*, 31 Wn.App. 724, 728, 644 P.2d 724 (May 1982) states, "Even though the contempt order here, is in part punitive, courts will regard the contempt as civil in nature if its primary purpose is to coerce compliance."

Based on the foregoing, this Court finds the sanctions imposed by the Tribal Court against the appellant were clearly intended to coerce the Probation and Parole Department to file PSI's in a timely manner and not to punish the appellant for his actions.

For the reasons stated above, it is Ordered that the Judgment of the Tribal Court is Affirmed and the appellant's bond shall be forfeited and converted to satisfy the $100.00 fine.